

The status of children arising from inter-country surrogacy arrangements

The commercial edition of this book is published by Eleven International Publishing.

ISBN 978-94-6236-612-1

ISBN 978-94-6274-411-0 (E-book)

© 2016 Michael Wells-Greco | Eleven International Publishing

Published, sold and distributed by Eleven International Publishing

P.O. Box 85576

2508 CG The Hague

The Netherlands

Tel.: +31 70 33 070 33

Fax: +31 70 33 070 30

e-mail: sales@budh.nl

www.elevenpub.com

Sold and distributed in USA and Canada

International Specialized Book Services

920 NE 58th Avenue, Suite 300

Portland, OR 97213-3786, USA

Tel.: 1-800-944-6190 (toll-free)

Fax: +1-503-280-8832

orders@isbs.com

www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Printed in The Netherlands

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

THE PAST, THE PRESENT, THE FUTURE

Dissertation

To obtain the degree of Doctor at Maastricht University,
on the authority of the Rector Magnificus Prof. dr. L.L.G. Soete,
in accordance with the decision of the Board of Deans,
to be defended in public on

Thursday 1 October 2015, at 14:00 hours

by

Michael Wells-Greco

Supervisor:

Prof. dr. G.R. de Groot

Co-supervisor:

Dr. S.W.E. Rutten

Assessment Committee:

Prof. dr. C. Flinterman (Chair)

Prof. dr. K. Boele-Woelki (University of Utrecht, the Netherlands)

Prof. dr. M. Pertegás (Hague Conference on Private International Law)

Dr. S.F.G. Rammeloo

Prof. dr. P. Wautelet (University of Liege, Belgium)

TABLE OF CONTENTS

Abbreviations	xiii
1 Introduction to this thesis	1
1.1 Background	1
1.2 Setting the scene	1
1.3 Jurisdictional approaches	12
1.4 Developing the existing research	17
1.5 Research questions	22
1.6 Research aims and valorizations	24
1.7 Research approach and methodology	25
1.8 The importance of Europe for this research	29
1.9 Research structure	30
1.9.1 Chapter Two: Mapping the policy issues	30
1.9.2 Chapter Three: A comparative perspective	31
1.9.3 Chapter Four: Children's rights in inter-country surrogacy	32
1.9.4 Chapter Five: The right to a nationality and the prevention of statelessness	35
1.9.5 Chapter Six: Where to from here?	36
1.10 Difficulties and restrictions	37
2 Mapping the policy issues	41
2.1 What is surrogacy?	41
2.1.1 What are the types of surrogacy?	43
2.1.2 Parenthood and ART	45
2.1.3 Glossary of key terms used in this research	45
2.1.4 What is a surrogacy agreement?	48
2.1.5 Empirical data	49
2.2 Arguments over surrogacy	50
2.2.1 Arguments against surrogacy	50
2.2.2 The effects of surrogacy on the child	55
2.2.3 The effects of surrogacy on the surrogate	56
2.2.4 The effects of surrogacy on the intending parents	58
2.2.5 The effects of surrogacy on gamete providers	59
2.2.6 Arguments for surrogacy	60
2.3 Reproductive tourism	63

TABLE OF CONTENTS

2.4	'Cyber procreation' and surrogacy as a business	64
2.5	Agencies, brokers, and intermediaries	64
2.6	Fees for and cost of a surrogacy arrangement	65
2.7	Concluding remarks	67
3	A comparative perspective	71
3.1	Introductory remarks	71
3.2	Establishment of legal parentage	73
3.2.1	The question of applicable law	73
3.2.2	The question of recognition of foreign judgments concerning parentage	76
3.2.3	The question of recognition of foreign authentic acts concerning parentage	76
3.2.4	The acceptability of foreign law	77
3.3	France	83
3.3.1	Overview of domestic approach	83
3.3.2	Legal parenthood in the context of surrogacy	86
3.3.3	Inter-country surrogacy and private international law on parentage	90
3.3.4	Nationality of the child	96
3.3.5	Birth registration and records	98
3.3.6	National considerations	98
3.4	Switzerland	100
3.4.1	Overview of domestic approach	100
3.4.2	Legal parenthood in the context of surrogacy	101
3.4.3	Inter-country surrogacy and private international law on parentage	103
3.4.4	Nationality of the child	109
3.4.5	Birth registration and records	110
3.4.6	National considerations	111
3.5	Austria	113
3.5.1	Overview of domestic approach to surrogacy	113
3.5.2	Legal parenthood in the context of surrogacy	113
3.5.3	Inter-country surrogacy and private international law on parentage	114
3.5.4	Best interests of the child, family life, and public policy	117
3.5.5	Nationality of the child	117
3.5.6	Birth registration and records	118
3.5.7	National considerations	118

TABLE OF CONTENTS

3.6	Belgium	119
3.6.1	Overview of domestic approach to surrogacy	119
3.6.2	Parenthood in the context of surrogacy	122
3.6.3	Payments in surrogacy	136
3.6.4	Nationality of the child	137
3.6.5	Birth registration and records	139
3.6.6	National considerations	140
3.7	The Netherlands	142
3.7.1	Overview of the domestic approach to surrogacy	142
3.7.2	Legal parenthood in the context of surrogacy	145
3.7.3	Payments in surrogacy	154
3.7.4	Nationality of the child	155
3.7.5	Birth registration and records	156
3.7.6	National considerations	157
3.8	United Kingdom	159
3.8.1	Overview of the domestic approach to surrogacy	159
3.8.2	Legal parenthood in the context of surrogacy	161
3.8.3	Legal requirements on a surrogate and the commissioning parents	167
3.8.4	Enforceability of surrogacy agreements	175
3.8.5	Payments in surrogacy	177
3.8.6	Nationality of the child	184
3.8.7	Birth registration and records	186
3.8.8	Advertisement	188
3.8.9	National considerations	189
3.9	India	191
3.9.1	Overview of the domestic approach to surrogacy	191
3.9.2	Legal parenthood	192
3.9.3	Payments in surrogacy	196
3.9.4	Nationality of the child	197
3.9.5	Birth registration and records	198
3.9.6	National considerations	199
3.10	California (USA)	206
3.10.1	Overview of the domestic approach to surrogacy	206
3.10.2	Legal parenthood in the context of surrogacy	209
3.10.3	Surrogacy agreements	214
3.10.4	Payments in surrogacy	218
3.10.5	Advertisement	219
3.10.6	Nationality of the child	220
3.10.7	Birth registration and records	221

TABLE OF CONTENTS

3.10.8	National considerations	221
3.11	Analysis of findings	222
3.12	Comparative table	222
3.13	Initial conclusions drawn from the comparative review in the context of parentage	225
3.13.1	Jurisdictions which are anti-surrogacy: Express prohibition	225
3.13.2	Jurisdictions where surrogacy is largely unregulated: neutral stance	231
3.13.3	Jurisdictions which are pro-surrogacy: Express permission and regulation	232
3.14	Determining the basis for legal parentage following surrogacy arrangements	236
3.14.1	The legal mother	238
3.14.2	The legal father	239
3.14.3	The co- or second parent	240
3.14.4	Conclusion on applicable law in matters concerning parentage	241
3.14.5	Conclusion on the recognition of legal parentage established abroad	242
3.14.6	Public policy in the context of inter-country surrogacy	243
3.14.7	Tensions between genetic and social conceptions of parenthood	251
3.15	Initial conclusions drawn from the comparative review in the context of nationality at birth	254
3.16	Emerging problem areas	256
3.16.1	Terminology – Lack of agreed definitions of key words	256
3.16.2	Uncertain civil status	257
3.16.3	Birth records and registration	258
3.16.4	Possible lack of political will to respond to the problems created by surrogacy	259
3.16.5	An unregulated international market around surrogacy	260
3.16.6	Wide variation and absence of limits, specifically on fees and costs	261
3.16.7	Reproductive travel and surrogacy	270
3.16.8	Real dangers, weak sanctions, and ineffective deterrents	271
3.17	Where does that leave us?	273
4	Children's rights in inter-country surrogacy	277
4.1	Introductory remarks	277
4.2	Sources of international law	280
4.3	International and regional human rights regimes	284
4.3.1	Europe	289

TABLE OF CONTENTS

4.3.2	The Americas	290
4.3.3	Africa	291
4.3.4	Arab states	292
4.4	An overview of the relevant international obligations	294
4.5	International covenant on economic, social, and cultural rights	294
4.5.1	Child's rights and parent-child relationships	295
4.5.2	Relevance to surrogacy	295
4.6	International covenant on civil and political rights	296
4.6.1	The child's rights	296
4.6.2	Parent-child relationship	296
4.6.3	Relevance to surrogacy	297
4.7	Convention on the rights of the child	298
4.7.1	The child's rights	301
4.7.2	Parent-child relationship	304
4.7.3	Relevance to surrogacy	307
4.7.4	Birth records, birth name, and registration	311
4.7.5	Possible advocacy points	313
4.8	Convention on the elimination of discrimination against women	315
4.8.1	Relevance to surrogacy	318
4.9	UN Conventions relevant to prohibition and prevention of the sale of children and women and trafficking	320
4.10	Hague Conference on Private International Law	329
4.10.1	Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of children	331
4.10.2	The child's rights	331
4.10.3	Parent-child relationship	332
4.10.4	Relevance to surrogacy	332
4.10.5	Convention on the protection of children and cooperation in respect of Inter-country adoption	332
4.10.6	The relationship between inter-country surrogacy and inter-country adoption	335
4.10.7	Relevance to surrogacy	341
4.11	Council of Europe	348
4.11.1	European Convention on Human Rights	348
4.11.2	The role and approach of the European Court of Human Rights	352
4.11.3	Examples from the case law of the Strasbourg Court	357
4.11.4	Specific lessons from the European Court of Human Rights	391
4.11.5	Towards a child-centred approach	399

TABLE OF CONTENTS

4.12	The CEFL Principles	400
4.13	International Commission on Civil Status	401
4.14	European Union	402
4.14.1	EU instruments relevant to family law	403
4.14.2	The child's rights	405
4.14.3	Parent-child relationship	406
4.14.4	Relevance to surrogacy	410
4.15	Conclusions and recommendations	418
4.15.1	The influence of European and international human rights law on surrogacy	419
4.15.2	The importance and elements of unconditional and informed consent	421
4.15.3	The child's best interests	423
4.15.4	A child's right to be heard and to express views	424
4.15.5	A child's right to information about his or her origins	425
4.15.6	A child's right to registration at birth	427
4.15.7	A right to continuity of a personal status	428
4.15.8	A child's right to parents or a parent's right to a child?	429
5	The right to a nationality and the prevention of statelessness	433
5.1	Introductory remarks	433
5.2	The attribution of citizenship	434
5.3	Defining the right to a nationality	437
5.4	International instruments relevant to the prevention of statelessness and the preservation of a nationality	439
5.4.1	CRC	440
5.4.2	Specific UN conventions on preventing statelessness	442
5.4.3	Relevant UN bodies and other UN instruments	451
5.4.4	Regional instruments	453
5.4.5	ECN	455
5.5	Some concluding observations on a surrogate-born child's right to a nationality	461
5.6	Conclusions and recommendations	464
6	Where to from here?	469
6.1	Key findings	469
6.2	Domestic action	476
6.2.1	National review	477
6.2.2	Type of surrogacy arrangements	479

TABLE OF CONTENTS

6.2.3	Determination of legal parenthood	480
6.2.4	Unconditional and informed consent	489
6.2.5	Birth registration and records	490
6.2.6	Nationality and immigration status	490
6.3	International action	491
6.3.1	Bilateral cooperation	493
6.3.2	Multilateral cooperation	493
6.4	Joint general comment/recommendation of the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women	510
6.5	Final reflections: A work in progress	511
Appendix 1 Human rights of particular significance to children		515
Appendix 2 Human rights of particular significance to women		517
Appendix 3 Summary responses to 1993 Hague Inter-Country Adoption Convention		519
Appendix 4 Interviews		525
Appendix 5 Valorisations relating to the Dissertation		527
Appendix 6 Abstract		531
Appendix 7 Bibliography and literature		533
Appendix 8 Acknowledgments		565
Appendix 9 Curriculum Vitae		567
Appendix 10 Summary in English		569
Appendix 11 Summary in Dutch		575

ABBREVIATIONS

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
ART	Assisted Reproductive Technology
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIEC/ICCS	International Commission on Civil Status
CJEU	Court of Justice of the European Union
COE	Council of Europe
CRC	Convention on the Rights of the Child
DCC	Dutch Civil Code (Burgerlijk Wetboek)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights (or Strasbourg Court)
ed.	Edition, Editor
eds.	Editors
EU	European Union
HCCH	Hague Conference on Private International Law
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IPRG	Private International Law Act of Austria
IVF	In Vitro Fertilisation
LDIP	Private International Law Act of Switzerland
LGBTI	Lesbian Gay Bisexual Transgender Intersex
MAR	Medically Assisted Reproduction
PGD	Pre-implantation Genetic Diagnosis
PIL	Private International Law
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

ABBREVIATIONS

UNHCR

UN High Commissioner for Refugees

USA

United States of America

WHO

World Health Organisation

1 INTRODUCTION TO THIS THESIS

1.1 BACKGROUND

This thesis is about the status of the child and the determination of legal parentage and birth-right nationality of a child born in a case of inter-country surrogacy. The overarching purpose of this thesis is to examine the legal aspects of parenthood and nationality following inter-country surrogacy arrangements, the influence of European and international human rights law on the determination of parentage, the establishment of nationality, and the prevention of statelessness.

The aims of this research are to establish whether national laws on parenthood and the establishment of nationality sufficiently protect the interests of a child born by way of surrogacy¹ in accordance with the standards identified under European and international human rights law. A key objective is to explore practical solutions to the problems that may arise in an inter-country surrogacy arrangement; these include whether existing national rules need amendment or clarification and whether new rules or other instruments at a domestic, regional, and/or international level are needed.

This thesis starts from the premise that it cannot be in the best interests of children born by way of surrogacy to leave their important relationships of care outside of a legal framework of rights and responsibilities. A balance is needed, not only placing the best interests of the child as a primary consideration but also respecting the balance that must be achieved between children, intending parents, the surrogate, gamete providers, and the state. The challenge is to ensure that all children enjoy human rights equally (rights to a nationality, an identity, and to establish and preserve family relationships) irrespective of a child's method of conception and birth while, at the same time, realising these rights within a child protection framework.

1.2 SETTING THE SCENE

Law and society have always attached a distinct significance to a person's status, and 'parentage' confers status on both the adult(s) and on the child.² Every legal system assigns parents to children because each legal system attaches legal consequences to the status of being a parent or child of a certain person. These legal consequences are very diverse. In

1 In this thesis, reference is made to 'surrogate-born children' to assist with the review and the analysis. Surrogate-born children are children like all others.

2 *E & F (Assisted Reproduction: Parent)* [2013] EWHC 1418 (Fam) at para. 1.

nationality law, the child may obtain the nationality³ of his or her parents; in terms of private law, the parents may be under an obligation to maintain their child and have parental responsibility over the child, and children may be entitled to inherit from their parents. In each of these cases, it must be determined who are the legal parent(s) of the child. Consequently, the extent to which a child's family unit enjoys legal recognition and parental legal status is confirmed has a considerable impact on that child's day-to-day and longer term enjoyment of his or her rights. The creation of such a relationship affects not only the mutual connection of parent and child but also the associations between the child and the whole of that parent's family and the wider society in which that child lives as well as the child's own identity, feeling of self-value, and protection.⁴

Historically, the issue of who the law should identify as the child's legal parent(s) was relatively settled. Most commonly, the people deemed to be a child's parents (with associated rights and, more importantly, responsibilities) have been, by default, those who conceived the child or, in the case of married couples, the birth mother and her husband. In broad terms, such presumptions have also operated to dictate that a particular type of family – the nuclear family – is the suitable context in which children ought to be produced.⁵ A historical expression of this is found in the social stigma once attached to children born out of wedlock.⁶ Yet the interests at stake in the law on parentage are shifting and have been for some time, and the view of who a parent is and the equal responsibilities of parents has evolved. Several factors have led to this development. The family as a societal phenomenon has transformed over the years. The nuclear family, based on the married heterosexual couple, is no longer the only socially or legally accepted model. There has been a dramatic increase in the number of reconstituted families; single-parent families; and LGBTI⁷ families, and irrespective of the grouping, these are all families. At the same time, the concept of parent has been widened to also include non-genetic parents. The 'family'

3 In this thesis, the term 'citizenship' is used to refer to the legal relation between a person and a state, as recognised in international law. This status is often also referred to as 'nationality,' particularly in international legal documents, and whenever citing directly from such documents or from national laws, the term cited is used in the original document. The terms 'citizenship' and 'nationality' are thus generally used as synonyms (see EUDO Citizenship Glossary available at <<http://eudo-citizenship.eu/databases/citizenship-glossary/glossary>>).

4 For a multi-disciplinary collection of essays from the Cambridge Socio-Legal Group considering the varying circumstances, manner, timing, and experiences of birth, see J. Herring, F. Ebtehaj and M. Johnson, *Birth Rights and Rights* (Hart Publishing 2011).

5 The expression 'nuclear family' is used to denote families composed of a mother and a father romantically involved with each other and their genetically related children that they have conceived naturally.

6 D. Cutas and S. Chan (eds.), *Families – Beyond the Nuclear Ideal* (Bloomsbury Academic 2012). Cutas and Chan examine, through a multi-disciplinary lens, the possibilities offered by relationships and family forms that challenge the nuclear family ideal, and some of the arguments that recommend or disqualify these as legitimate units in our societies.

7 The term 'LGBTI families' is used rather loosely throughout this thesis as shorthand to indicate the close and loving relationships established by adults who would define themselves as either lesbian, gay, bisexual, transgender, intersex and their children.

is neither a static nor a unitary concept, and, as Hodson has observed, ‘*the hegemonic [nuclear] ideal is becoming increasingly distant from the lived reality of very many families and their children.*’⁸

The picture of parenthood has become even more complex through the use of surrogacy and different methods for assisted reproduction (in particular, the use of assisted reproductive technology (ART)⁹ or medically assisted reproduction (MAR)¹⁰ that are accessible on a global market) helping many people become genetic or biological parents when this was previously impossible. Technology makes it possible for children to be born with no genetic link to the purported parents (via sperm and egg donation). Today, birth mothers may be neither the genetic mothers nor the intending mothers. Who then, as one court has asked, ‘*should the law regard as the mother?*’¹¹

The separation of reproductive and care-taking contributions as a result of MAR processes, together with their perceived more widespread occurrence, forces the re-evaluation of assumptions as to parentage. This is particularly so mindful that, following surrogacy, a child can have up to six potential ‘parents’: two gamete providers, the gestational/birth mother and her husband or partner (if she has one), and the two intending parents, wherein these are different people.

This brings us to this research topic. Surrogacy¹² arrangements are a known and increasingly popular method¹³ for couples (heterosexual or homosexual) and singles (again,

8 L. Hodson, ‘Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR’ [2012] *International Journal of Children’s Rights* 2.

9 Assisted reproductive technology (ART): all treatments or procedures that include the in vitro handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and trans cervical embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman’s partner or sperm donor. For a glossary of terms, see ‘International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009, available at <www.who.int/reproductivehealth/publications/infertility/art_terminology2.pdf>.

10 Medically assisted reproduction (MAR): reproduction brought about through ovulation induction, controlled ovarian stimulation, ovulation triggering, ART procedures, and intrauterine, intracervical, and intravaginal insemination with semen of husband/partner or donor. See ICMART and WHO glossary of terms, *ibid*.

11 *Re W (Minors) (Surrogacy)* [1991] 1 FLR 385, 386.

12 Or *Gestation pour autrui* (French), *Draagmoederschap* (Dutch), *Ersatzmutterschaft* (German), *Maternità surrogata* or *gestazione di sostegno* (Italian), *Surrogat* (Danish), *Maternidad subrogada* (Spanish), *arrangament ma’ omm surrogata* (Maltese).

13 J. Carbone and N. Cahn, ‘Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty’ [2003] 11 *William and Mary Bill of Rights Journal* 1011-1025. That parentage becomes especially messy when conception has occurred through assisted procreation is observed also by Hill, who notes: ‘[S]cience has distilled the various phases of procreation – coitus, conception, and gestation – into their component parts, wreaking havoc on our prevailing conceptions of parenthood.’ J. Hill, ‘What Does It Mean to Be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’ [1991] 66 *North-Western University Law Review* 353-354.

heterosexual or homosexual) seeking to become parents.¹⁴ While a number of jurisdictions are now regulating certain aspects of surrogacy, this is by no means the general rule.¹⁵ It is now well-documented that some jurisdictions have no legislation expressly permitting or prohibiting surrogacy arrangements,¹⁶ opting instead for voluntary guidelines or no form of regulation at all. Others have expressly banned the practice or introduced partial bans by making it impossible in conjunction with MAR. However, prohibiting surrogacy does not of itself prevent these arrangements from occurring, and all estimates and the growing research literature point towards surrogacy being a practice that does in fact occur and is not particularly rare. There are a number of reasons for this. If intending parents¹⁷ have the financial means, it is possible for them to enter into surrogacy arrangements in countries where medically assisted surrogacy is available, surrogacy is lawful, there are a greater number of willing surrogates, and the law of the place of birth of the child provides that the intending parents are the legal parents of the child at birth.¹⁸ Moreover, those who wish to enter into a surrogacy arrangement may attempt to do so in any event through private surrogacy arrangements.

It is perhaps unsurprising that surrogacy is a controversial and complex subject which raises social, ethical, and legal issues. It is a subject that has aroused considerable interest following widespread publicity given to recent instances of such arrangements in a number of states.¹⁹ As Cook and others have written, surrogacy creates ‘anxieties’.²⁰ Nevertheless,

14 Prel. Doc. No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference (available at <www.hcch.net> under ‘Work in Progress’ then ‘General Affairs’); see Section IV(a).

15 E. Davis, ‘The Rise of Gestational Surrogacy and the Pressing Need for International Regulation’ [2010] 21 Minnesota Journal of International Law 120-123.

16 E.g., HCCH study: ‘A Study of Legal Parentage and The Issues Arising From International Surrogacy Arrangements’, Prel. Doc. No 3 C of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference (‘HCCH 2014 Study’).

17 In this thesis, unless quoting directly from legislation or case law, ‘intended parent’ or ‘intending parent’ is used given that not *all* surrogacy arrangements are necessarily commercial, which is what the term ‘commissioning parent’ seems to allude to and persons who are willing to act as surrogates, whether for altruistic and/or, more usually, commercial reasons, often wish to be assured that their rights of parentage ascribed to them at the birth of the child can be revoked and vested in the intending parent(s). See the Glossary of key terms set out in Chapter Two at 2.1.3 for the meaning of special terms used.

18 The surrogate may also be referred to as the ‘gestational mother’. There has been some debate over whether it is the intended mother or the gestational mother who is the surrogate. See D. Morgan, ‘A Surrogacy Issue: Who Is the Other Mother?’ [1994] International Journal of Law and the Family 386. In this thesis, ‘surrogate’ or ‘surrogate mother’ is used to refer to a woman who agrees to carry and deliver a child for another individual or couple because alternate references to this role (‘contract mother’ and ‘gestational mother’) are not entirely accurate; e.g., a woman who bears a child for another person may never perceive of herself as a mother.

19 The matter of Baby Gammy reported in the media in August 2014 (child born in Thailand to a surrogate who was allegedly abandoned by his Australian intending parents because he has Down’s syndrome) led to a public outcry, see, e.g., from the main news stories, ‘Gammy-Chanbua-and-the-surrogate-babies-left-behind’, *The Telegraph* 5 August 2014 available at <www.telegraph.co.uk/health/children_health/11010940/Gammy-Chanbua-and-the-surrogate-babies-left-behind.html>.

20 R. Cook et al. (eds.) *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003) 16.

what is important to consider at the outset is that, as some jurisdictions become more permissive in their approach to surrogacy and fertility treatment continues to grow in popularity and becomes more available, many states have to face these anxieties and difficult new challenges. The most prevalent of these challenges (and the main focus of this thesis) are the themes of legal parenthood²¹ and the nationality of the surrogate-born child.²² The challenges and the uncertainty are best illustrated by an example²³:

Mrs. A is 47 years old. Her husband, Mr. A, is 41. The couple's relationship began in 2002, and they got married in October 2008. Both have children from previous relationships: Mr. A has three children who live with their mother and Mrs. A has two daughters from a previous marriage. Prior to 2010, Mr. and Mrs. A spent five years unsuccessfully trying to have their own child, a process which has involved surgery for Mrs. A and fertility treatment at a number of clinics. In 2007, Mrs. A had an operation on her uterus and her fallopian tubes, and in 2008, the couple underwent two cycles of IVF treatment at an English Fertility Centre. In 2009, they had six cycles of IVF treatment using donor eggs at an Institute in Barcelona. Following the failure of donor egg IVF treatment, the couple were advised by the Institute in Spain to explore surrogacy in India as this appeared to be their only remaining option to have a child.

Mr. and Mrs. A explored surrogacy via a British agency, but in 2009, both Childlessness Overcome Through Surrogacy (COTS)²⁴ and Surrogacy UK stated on their websites that they could not consider couples for the next three years as there was a shortage of surrogates in the UK. Mr. and Mrs. A considered surrogacy in the USA, Georgia, and the Ukraine but eventually decided to use a fertility clinic in India. The specialist there, Dr. S, had worked at reputable fertility clinics in the UK and was a member of the British Fertility Association. Mrs. A states that [she and her husband] also chose India for cost reasons and because they were assured by the Indian clinic that the surrogates would have excellent ante-natal care.

21 See T. Struycken who observes the emergence of a new 'refugee law' in 'Surrogacy, A New Way To Become A Mother? A New PIL Issue', in K. Boele-Woelki *et al.* (eds.) *Convergence And Divergence In Private International Law* (The Hague, Eleven International Publishing 2010) 357-372.

22 See C. Rotman, 'Gestation pour autrui: les enfants fantômes de la République', *La Libération*, 20 May 2009, available at <www.liberation.fr/societe/0101568271-gestation-pour-autrui-les-enfants-fantomes-de-la-republique>. See also R. Storrow, who speaks of 'international surrogacy and the new illegitimacy' in 'The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy' [2012] 20(3) *Journal of Gender, Social Policy and the Law*.

23 Quoted from *Re X and Y (Children)* [2011] EWHC 3147 (Fam).

24 Founded by Kim Cotton, a surrogate reported to have delivered the UK's first child born as a result of a commercial surrogacy agreement.

Mr. and Mrs. A first contacted Dr. S in September 2009. Her company is based at the main maternity hospital in New Delhi. Mr. and Mrs. A were advised to use two surrogates (C and E) to increase the chances of a successful birth, and in January 2010, they travelled to India. On that trip, they met both surrogates, and D, the husband of C.

E worked as a maid earning 9,000 rupees a month. She had two children. She was married to F in 1993, but he deserted her in 2000 and she had had no contact with him since that date. C worked as a housekeeper and her husband D as a waiter, earning 11,000 rupees a month. They had a son.

The financial agreement between Mr. and Mrs. A and each surrogate provides for a payment of 200,000 rupees²⁵ in compensation payable in instalments: 15,000 on embryo transfer; 10,000 on confirmation of pregnancy and for every month of the pregnancy; the balance remaining to be handed over on birth and handing over the child. The monthly maintenance was said to cover all genuine expenses associated with the pregnancy, and Mr. and Mrs. A were to pay all medical expenses and medication costs. The agreement states that the clinic was not a party to or responsible for the financial agreement between the surrogates and Mr. and Mrs. A.

Following completion of the surrogacy agreements, Mr. and Mrs. A returned to the UK. In February 2010, they learned that both surrogate mothers were pregnant.

X was born in a hospital in New Delhi in India. His surrogate is C, an Indian woman married to D. X has lived with and been cared for by Mr. and Mrs. A since he was three days old. His genetic father is Mr. A and his genetic mother is an anonymous egg donor. His legal parents at his birth were C and D.

Y was born at the same hospital. Her surrogate is E. Y has lived with and been cared for by Mr. and Mrs. A since the day after she was born. Her genetic father is Mr. A and her genetic mother is the same anonymous egg donor. Her legal parent at birth was E. X and Y are, however, full genetic siblings.

After birth, both E and C also signed consent forms confirming the births, the receipt of payment, and consenting to their removal from India.

The process of obtaining British citizenship for the children and exit visas from India was complex. The authorities in India interviewed the couple with the children and also interviewed the surrogates and D. However, the Home Office issued certificates allowing them to travel to the UK with Mr. and Mrs. A.

²⁵ Approximately EUR 3,000.

Upon returning to the UK from India, Mr. and Mrs. A wanted to be recognised as the children's legal parents under English law. The English Court considered the critical issue to be whether the payments made by Mr. and Mrs. A fell afoul of the UK law on surrogacy, principally whether retrospective authorisation of any payments was required.²⁶ Mr. and Mrs. A argued that although their payments had gone beyond reasonable expenses (as required under UK law), they had acted in good faith and that the payments were not so disproportionate that the granting of parental orders would be an affront to public policy.²⁷ They therefore sought the authorisation of these payments. On behalf of the children, it was also argued that the payments should be retrospectively authorised and that the children's welfare throughout their lives required the making of orders. The President of the High Court accepted that Mr. and Mrs. A were genuine and the payments were not disproportionate and made parental orders in their favour. However, the President took the opportunity to endorse the approach taken by Mr. Justice Hedley in an earlier judgment:

I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by an application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. *The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.* Bracewell J's decision in *Re AW (Adoption Application)* [1993] 1 FLR 909 is but a vivid illustration of the problem. [...] It is, of course, not for the court to suggest how (or even whether) action should be taken. I merely feel constrained to point out the problem.²⁸
[Emphasis added, MWG]

²⁶ The UK's approach to surrogacy is considered in Chapter Three at 3.8.

²⁷ It is a general principle of PIL that a rule of foreign law which should govern as the applicable law, as the most appropriately connected rule, may be disregarded if its application would be contrary to public policy. This allows the court to avoid the application of a foreign law when the substantive content of the rule or the result that would be reached by its application is objectionable to the forum. For a general introductory overview of the tenets of private international law, see M. Harding, *Conflicts of Law* (Routledge 2013); J. Fawcett and J. Carruthers, *Private International Law* (14th ed, Cheshire, North & Fawcett 2008).

²⁸ See *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at para. 40.

Happily, in the instant case, no such difficulty arose. Yet this case provides a clear example of the difficulties created as a result of surrogacy arrangements being subject to varying degrees of domestic regulation, from significant regulation to none at all, and also because of the existence of significant differences in the effect of any domestic regulation. The case also presents a conflict of laws: Who are the legal parents of the surrogate-born children? There is a conflict because the case has ties with both Indian law (place of birth, residence, and nationality of the surrogates) as well as with UK law (residence and nationality of the intending parents, as well as residence of the children). There can be no doubt that both Mr. and Mrs. A are the social parents of the child. However, this does not make them *at law* the parents of the children under English law. The father is also a genetic parent, but that, too, in the circumstances of this case, does not necessarily make him at law a parent or the father of the child. Moreover, the legal parental status, for the purposes of English law, of the commissioning mother and the commissioning father (as defined in the relevant UK legislation) is not affected by the fact that both of them are registered as the child's parents on the Indian birth certificates.

The case of the *Balaz* twins,²⁹ wherein an Indian surrogate was commissioned by a German couple, also highlights the consequences of conflict of laws. Caught between German prohibitions regarding surrogacy and Indian policies seeking to promote surrogacy, the twins appeared destined to become wards of the Indian State:

they ran this risk (or, were made to do so) despite the agreement of all the parties ostensibly involved in the transactions surrounding their birth. That agreement, however, was forged exclusively among private actors whereas the regulation of reproduction and familial relations, like that of so many other spheres pertaining to everyday life, bears the imprints of nation-building and welfare policies and falls squarely within the conventionally understood – essential domestic jurisdiction of states.³⁰

What is important for this thesis is that as a result of the different answers to the challenges posed by surrogacy arrangements, legal systems may come to different solutions in the same case. Thus, for example, the conflict between English and Ukrainian law in a number of cases has resulted in parental status being lost by operation of law. This left the surrogate-born children without legal parents and without rights to acquire either British or Ukrainian

29 *Jan Balaz v. Anand Municipality* 11 November 2009 Letters Patent Appeal No. 2151 of 2009 in Special Civil Application No. 3020 Of 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151 Of 2009 with Special Civil Application No. 3020 of 2009, *available at* <<http://indiansurrogacylaw.com/jan-balaz-v.-anand-municipality.html>>. See Chapter Three at 3.9.

30 Y. Ergas, 'Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy' [2013] *Emory International Law Review*.

citizenship; the children were, in the words of Mr. Justice Hedley, ‘*marooned, stateless and parentless, whilst the couple could neither remain in the Ukraine nor bring the children to the UK*’³¹

In situations in which different legal systems come into contact as a result of cross-border legal relations, the formulation of private international law (PIL³²) aims to provide legal certainty by providing an efficient solution to meet, in most parts, the legitimate expectations of the parties involved. Not providing for a solution, for example, by disregarding a foreign judgment or the disapplication of foreign law could result in injustices for the individuals concerned such as ‘limping’ legal relationships (*rappports juridiques boiteuses*). A ‘limping legal relation’ is a legal relationship that exists in one legal system but not in another, or when valid in both, it has different legal effects in each of them.³³ Limping legal relationships can occur in virtually all areas of the law. Aside from surrogacy, examples range from the traditional cases of limping marriages (*matrimonium claudicans*)³⁴ to, *inter alia*, limping adoptions³⁵ or same-sex unions.³⁶

It is difficult to achieve harmonisation with the variety of PIL rules that are enacted at the domestic level because each national legal system has its own view and approach on the best way to solve conflicts of laws. Since there is no worldwide consensus on the best connecting factor for legal parentage, each legal system has its own conflict rules, often

31 *X & Y (Foreign Surrogacy)* [2008] EWHC 3030.

32 Private international law is also referred to as the conflict of laws in certain states and, as introduced by W. Goldschmidt, as the Law of Tolerance (Derecho de Tolerancia) (A. Perugini Zanetti (ed.) *Derecho internacional privado: Derecho de la tolerancia* (Abeledo Perrot SA 2011)). Every modern legal system has its own domestic rules of PIL. For example, the rules of PIL in Switzerland may differ from the rules of PIL in place in the Netherlands. The PIL rules are used to solve three key questions: (1) Does the court have jurisdiction to hear the case/deal with the matter? (2) What system of law should be applied to determine the dispute: national law or a foreign law? (3) When should the domestic court recognise and enforce a foreign judgment? Each state has its own rules to deal with jurisdiction, applicable law, and recognition and enforcement of foreign judgments. In addition to the topics of jurisdiction, applicable law, and recognition and enforcement, a fourth area is judicial co-operation (see, e.g., A. Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009)).

33 See E. Strautins, *Limping Legal Relationships Within the Legal Order of European Union: Concept, Reasons for Emersion, Consequences, Current Situation at the EU – Treatment, Settlement and Means of Prevention* (Lambert Academic Publishing 2010).

34 For two classic examples of marriages annulled in France but held valid in England, see *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67, 164 Eng. Rep 917; *Ogden v. Ogden* [1908] 46 (CA).

35 Cass. civ. 18.5.2005 – n.o 02-21.075, Rev. Crit. Dip 2005, 483 (holding that an adoption revoked in Romania, the country in which the adoption was granted, was valid in France, while the Romanian judgments were not recognised). The adoption of a minor can be a full adoption or simple adoption. With a full adoption, the adoptee acquires the legal status of the natural child of the adopting parent(s). Adoptive parents are treated in law as the child’s parents and adoptive siblings as the child’s siblings. The child’s legal relationship with his or her family of origin is terminated. With a simple adoption, the connection with the natural parents at birth survives in principle. Only a small number of states provide for simple adoption, e.g., France and Belgium.

36 K. Boele-Woelki, ‘Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe’ [2000] 6 Louisiana Law Review 1053-1055.

with different connecting factors. The lack of consensus on the appropriate connecting factor is only one part of the problem why national conflict rules do not always solve the conflict of laws properly.³⁷ Even if the national conflict rules appoint the same legal system or different legal systems with the same rules, it is still possible that the foreign law is not applied if the result of its application is considered unacceptable or, more specifically, if it conflicts manifestly³⁸ with the fundamental values and standards of the receiving legal order. In that case, the foreign law violates the *public policy* of the state involved, which may, as a consequence, lead to a limping legal relationship.

The public policy exception is well known to national systems of PIL and to international conventions and supranational instruments. Public policy is therefore usually understood as a defence aimed at protecting those substantive values regarded as essential to the identity of the legal system of the forum. As it is actually meant to cover situations where the application of foreign law *in concreto* – not foreign law as such, taken *in abstracto* – would result in the said values being irretrievably frustrated, it is generally accepted that the operation of the clause is exceptional. Despite this position, very few (supra)national instruments specify expressly which values might be regarded by states as belonging to their public policy.

While the meaning of public policy changes from time to time and may be contingent upon the facts of an individual case, it does not lack a principled foundation. A plurality of sources may need to be looked at for the purpose of answering the public policy question. Domestic law will normally play an important role in this respect. Both constitutional and infra-constitutional rules may be relevant, to the extent that they reflect the existence of fundamental principles of the legal system they belong to. International conventions, too, may be relevant, in particular those in the field of human rights, be they regional (such as the European Convention of Human Rights) or international (such as the Convention on the Rights of the Child³⁹ or the Convention on the Elimination of Discrimination against Women⁴⁰). In the context of the European Union, the same may be said of those rules of European Union law, as they are conceived to ensure or reinforce the respect of fundamental rights in connection with personal status and family relationships. Since the scope and content of public policy depend on a combination of factors, public policy varies not only

37 This is not a new phenomenon. See the treatise of F.C. von Savigny, *System des heutigen römischen Rechts* (Band 8, Berlin: Veit 1849) (translated into English by William Guthrie, Edinburgh: T & T. Clark, Law Publishers 1869).

38 As substantive law currently stands, the public policy exception must be interpreted in a restrictive way. This rule is inferred from the systematic presence of the adverb ‘manifestly’ in provisions relating to public policy.

39 An overview of the principal human rights standards of particular significance to children is set out at Appendix 1.

40 An overview of the principal human rights standards of particular significance to women is set out at Appendix 2.

from one country to the other but also within one country from time to time. While public policy reflects the identity of each legal system, the way in which the exception is actually applied by national authorities may, at the European level, for example, be subject to oversight and scrutiny. This observation reflects a well-settled case law of the Court of Justice of the European Union and the European Court of Human Rights (discussed in Chapter Four) and should be deemed to apply, for example, both in respect of rules for the recognition of foreign judgments and in respect of rules dealing with conflict of laws issues.

There are many questions in this field, and what emerges is a real danger that the surrogate may not be the child's legal mother according to the laws of the state in which she delivered the child and the intending parents are not the legal parents of the child according to the laws of their state of residence and/or nationality. Of equal concern is the nationality status of these children. Depending on the state in which the child is born and the nationality laws applicable to the circumstances, surrogate-born children are at risk of being born stateless.

Yet, the problems that inter-country surrogacy creates are more than PIL problem areas. The multiplicity of the issues is best introduced by the following questions: What happens if the surrogate decides to terminate the surrogacy arrangement? What happens in the case of miscarriage or unintended multiple births? What about the surrogate's consent to the surrogacy process and the potential for exploitation? What happens if the intending parents change their mind or do not cover the expenses of the surrogate?⁴¹ And what happens to the child's nationality and access to and content of his or her birth records? At a later stage, other complications may arise, such as lawful and unlawful practices of child transfer across borders, cross-border custody (residence) and access (contact) dispute between the intending parents residing in one country and the surrogate in another, a dispute over maintenance and financial support, or a dispute over international child abduction. The task of responding to these problems in a divided family is always difficult, but it is even harder in family units, which fall outside a clear legal framework.

41 It has been reported in the media that a surrogate from Colorado (USA) has been left with \$217,000 in medical bills after delivering twins for an Austrian couple who have fled the US with the children. See <www.dailymail.co.uk/news/article-2054031/Carrie-Mathews-surrogate-mother-left-217-000-medical-babies-Austria.html#ixzz1s7fwSQwO> and <www.huffingtonpost.com/2011/10/26/carrie-mathews-surrogate-_n_1032931.html>.

1.3 JURISDICTIONAL APPROACHES

As suggested above, in most countries, surrogacy is either banned or regulated to some degree. Italy,⁴² Germany,⁴³ France,⁴⁴ Switzerland,⁴⁵ Sweden,⁴⁶ as well as several Australian states⁴⁷ and certain states of the USA⁴⁸ prohibit surrogacy often with civil and/or criminal sanctions.⁴⁹ In many legal systems, surrogacy agreements are void, or at least unenforceable,

42 Law n. 40 of 2004 prohibits both heterologous artificial insemination and 'utero in affitto' ('rent of the womb'), thus effectively prohibiting any form of surrogacy.

43 Contracts between the intending parents and the surrogate, as well as adoption placement contracts, are contrary to German public policy and therefore void (Section 138, para. 1 BGB).

44 Article 16-7 of the French Code Civil (discussed in Chapter Three at 3.3).

45 Under Swiss law, not only any kind of surrogacy but also egg and embryo donations are constitutionally and legally prohibited. Article 119(II)(d) Swiss Federal Constitution ; Loi fédérale du 18 décembre 1998 sur la procréation médicalement assistée, Recueil Systématique Du Droit Fédérale 810.11, Article 4. Thus, any surrogacy agreement is said to be illicit and void under Article 20(I) of the Swiss Code des obligations (discussed in Chapter Three at 3.4).

46 Act on Ethics Review of Research Involving Humans, Law No. 460 (2003) and Genetic Integrity Act, Law No. 351 (2006). *See*, for a detailed discussion, the work of J. Stoll, 'Surrogacy Arrangements and Legal Parenthood. Swedish Law in a Comparative Context' (Dissertation, Uppsala University 2013).

47 *E.g.*, Tasmania.

48 The establishment of legal parentage and the regulation of surrogacy in the USA are governed by US state law. In those US states that regulate surrogacy, the nature of such regulation varies widely. Some US states address surrogacy arrangements in their statutes, while in some US states, the law has developed through case law. Some US states will not enforce surrogacy agreements at all, finding them contrary to public policy, and others permit commercial surrogacy and allow an intending couple to go to court before the birth of a child to have their parentage established. Many US states have not addressed surrogacy at all. *See* the response to the HCCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by the USA (*available at* <www.hcch.net>) (discussed in Chapter Three at 3.10).

49 *E.g.*, in Italy and France, intermediaries are punished with up to six months in prison: *see* C. Campiglio, 'Lo stato di figlio nato da contratto internazionale di maternità' [2009] *Rivista di diritto internazionale private e processuale* 589-604; for a general overview, *see* F. Granet, 'L'établissement de la filiation maternelle et les maternités de substitution dans les Etats de la CIEC', *available at* <www.ciec1.org/Documentation/NotePMA.pdf>; and C. Nast, 'Établissement de la filiation et maternités de substitution dans certains États membres de la CIEC,' *available at* <[www.ciec1.org/ Documentation/EVS-Congres7-Gand-14-15mai2007-MeresPorteusesExposeCN-Francais](http://www.ciec1.org/Documentation/EVS-Congres7-Gand-14-15mai2007-MeresPorteusesExposeCN-Francais)>. PDF. *See also* the Working report of the French Senate 'La gestation pour autrui', from the *Législation Comparée Series at* <www.senat.fr/lc/lc182/lc182.pdf>.

either because the law expressly says so (France,⁵⁰ Portugal,⁵¹ and Spain⁵²) or because the agreement is deemed to have an illegal object and/or to be against public policy (Switzerland and Belgium⁵³). Since surrogacy normally – but not necessarily⁵⁴ – depends upon the use of MAR, the prohibition of surrogacy may also be found by indirect means, for example, where heterologous fertilisation with donated egg is prohibited (Austria⁵⁵ and Italy⁵⁶) or the use of such techniques for surrogacy purposes is criminalised or subject to a fine (such as in Italy⁵⁷).

A second category emerges of countries that have no specific statutory response to surrogacy. Belgium,⁵⁸ the Netherlands,⁵⁹ Malta,⁶⁰ and India⁶¹ do not have specific laws on surrogacy agreements; however, MAR techniques that could lead to surrogacy are broadly allowed (egg and embryo transfer and IVF).

50 In France, after the 2004 law on Bioethics, Article 16(7) Civil Code expressly declares any surrogacy agreement void, and some conducts of third parties (not of the parties to the agreement though) are criminally punishable (Article 227(12) Criminal Code). See generally E. Steiner, 'Surrogacy Agreements in French Law' [1992] 41 ICLQ 866.

51 Lei no: 32/2006. See generally J. de Oliveira Ascensão, 'A Lei n.º 32/2006, sobre a procriação medicamente assistida', 67 *Revista Da Ordem Dos Advogados* 977 (2007). The Portuguese Constitutional Court has declared Lei n.º 32/2006, on medically assisted reproduction, formally constitutional. Article 8 prohibits every form of surrogacy (Article 80, §10) and provides that the surrogate will always be considered the legal mother (Article 80, §30).

52 Ley 14/2006 Article 10(1). See P. Orejudo, 'Recognition in Spain of Parentage Created by Surrogate Motherhood' [2010] 12 *Yearbook of Private International Law* 619-637. The author is grateful to and acknowledges his discussions with Patricia Orejudo Prieto de los Mozos of Universidad Complutense de Madrid.

53 Cour d'Appel de Liège 6.9.2010 – 2010/RQ/20 available at <<http://jure.juridat.just.fgov.be>> (making reference to Articles 6, 1128 and 1133 of the Belgium Civil Code, and holding that a surrogacy agreement is void because it would be against public policy ('frappé de nullité absolue pour contrariété à l'ordre public')).

54 At least when the carrying mother's own eggs are used, one cannot exclude natural insemination. See *Re Adoption Application (Payment for Adoption)* [1987] Fam Law 382. See Chapter Three.

55 Fortpflanzungsmedizingesetz § 3 (prohibiting ova donation altogether and sperm donation for IVF). In *S.H. and Others v. Austria* (Application No. 57813/00), the Grand Chamber of the European Court of Human Rights found, by a majority (13-4 decision), the prohibition established by § 3 FMedG not to be contrary to Article 8 (right to respect for family life) ECHR.

56 Legge del 19 febbraio 2004, n. 40 ('Norme in materia di procreazione medicalmente assistita') Article 4 comma 3. Article 9 comma 3 establishes that, notwithstanding the prohibition, should a heterologous fertilization occur, the donor of the gamete will still have no parental status.

57 Legge 40/2004 Article 12 comma 1 (from EUR 300,000 to 600,000).

58 Discussed in Chapter Three at 3.6.

59 Discussed in Chapter Three at 3.7.

60 Article 6 Act is the Embryo Protection Act, 2012 ACT No. XXI of 2012.

61 See Supreme Court of India, 29 September 2008, *Baby Manji Yamada v. Union of India* (Writ Petition (C) no. 369 of 2008) [2008] INSC 1656, 2008 Supreme Court Almanac, also available at <www.liiofindia.org/in/cases/cen/INSC/2008/1656.html> ('This medical procedure [commercial surrogacy] is legal in several countries including in India'); see also Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy, Report No. 228 (August 2009), available at <<http://lawcommissionofindia.nic.in/reports/report228.pdf>>; J. Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' [2009] 30 *University of Pennsylvania Journal of International Law* 1429.

The third category includes those states, such as the UK,⁶² Greece,⁶³ Israel,⁶⁴ the Ukraine,⁶⁵ and certain states of the USA (e.g., California⁶⁶), which expressly legalise surrogacy (or, in the absence of express legislation, accept the practice) albeit subject to differing conditions and frameworks. Jurisdictions that chose to regulate surrogacy differ on, for example, whether surrogates should be allowed to receive payments beyond necessary or reasonable expenses (usually undefined), whether surrogacy should be restricted to couples, whether the intending couple should be married (opposite or same sex), whether one of the intending parents must be genetically related to the child, and the assessment and timing of the surrogate's consent.

The position held by the majority of states towards surrogacy – either to ban it or to ignore it – has given a rise to cross-border (international or inter-country) surrogacy.⁶⁷ There is little doubt that cross-border surrogacy is part of the phenomenon that has been already termed '*procreative (reproductive) tourism*'⁶⁸ or perhaps more appropriately in certain cases as '*cross-border reproductive care*'.⁶⁹ Cross-border reproductive travel has been defined by Pennings as the '*movement of citizens to another state or jurisdiction to obtain specific types of medical assistance in reproduction that they cannot receive at home.*'⁷⁰ As Ergas writes, the economy of reproduction that has emerged is fully globalised: '*analyses of 'care chains' have documented the migration of women from the global south to provide nanny and elder care services in the north, and the distribution of children available for*

62 Discussed in Chapter Three at 3.8.

63 See Article 1458 Civil Code, as amended by Law 3089-2002 on Medically Assisted Human Reproduction, as available and translated into English at <www.ciec1.org/Legislationpdf/Grece-Loi3089-2002-19decembre2002PMA-VersionsFr-Ang-Alld-Gr.pdf>.

64 See R. Schutz, 'Surrogacy in Israel: An Analysis of the Law in Practise' in R. Cook *et al.* (eds.) *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003).

65 See Article 123(2) Family Code of Ukraine, as available and translated into English at <www.mfa.gov.ua/data/upload/publication/usa/en/7148/family_kideks_engl.pdf>. Family Code of Ukraine and Order of the Ministry of Health Care of Ukraine No 771 dated 23 December 2008 provides legal grounds for surrogacy but does not provide special procedures for the acquisition of citizenship of a child in such a case.

66 See the discussion in Chapter Three at 3.10.

67 This thesis uses the terms 'cross-border surrogacy,' 'international surrogacy,' 'transnational surrogacy,' and 'global surrogacy' interchangeably. None are meant to imply the involvement of only two countries; surrogacy arrangements can involve three or more countries.

68 Discussion on the 'functioning market' in parenthood is not new, *see*, with respect to adoption, M. Ertman, 'What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification' [2003] 82 North Carolina Law Review 1-10. Historically, many people have been barred from adopting because of their sexual orientation, age, or marital status.

69 See F. Shenfield *et al.* 'Cross Border Reproductive Care in Six European Countries' [2010] available at <www.eshre.eu/ESHRE/English/Press-Room/ESHRE-News/page.aspx/>.

70 G. Pennings, 'Legal Harmonization and Reproductive Tourism in Europe' [2004] 19(12) Human Reproduction 2689-2694.

*transnational adoption evinces similar patterns.*⁷¹ The effect of cross-border reproductive travel on law, for example, occurs when reproductive travellers (and their children) are refused legal recognition when they return to their country of origin.

The growth in cross-border reproductive travel and, in particular, the growth in the international surrogacy market⁷² can be attributed to a number of interrelated factors. To quote from the letter dated 16 December 2011 from the Dutch Secretary of State for Safety and Justice to the Chairman of the Dutch House of Representatives:

International Perspective

In a number of countries the laws regarding surrogacy are less stringent. This makes the consideration of the international context of surrogacy important, given that the reality [of international surrogacy] impacts the process and development of surrogacy in the Netherlands. In contrast to the situation in the Netherlands, in India, Ukraine and some states in the US, high technological surrogacy or the anonymous donation of egg or sperm cells are normal practices. Globalisation and the internet make the access to these services abroad easier. Moreover, the low cost of surrogacy in India and Ukraine increases the attractiveness of these services.⁷³

There are a number of important points here. First, in what appears to be the case in many states worldwide, commercial surrogacy⁷⁴ (and in some states, MAR as a whole) is either banned or sharply regulated. In contrast, in a minority of states, commercial surrogacy is permitted, often with little or no internal regulation. The result of these differing laws, combined with means of communication and travel, has meant that individuals have been able to seek and arrange surrogacy abroad.⁷⁵ In some of these more permissive states, there is the added factor for intending parents of lower costs and perceived less risk. It would

71 Y. Ergas, 'Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy' [2013] *Emory International Law Review*. See also W. Chavkin and J. Maher, (eds.) *The Globalization of Motherhood – Deconstructions and Reconstructions of Biology and Care* (London/New York Routledge 2010).

72 The market includes the manufacturing of fertility hormones, harvesting of renewable natural resources (sperm and egg collection), international trade (foreign adoptions), expert services (IVF and other high-tech medicines), long-term storage (embryo banks).

73 Unofficial translation into English from Dutch: '*Vaststelling van de begrotingsstaten van het Ministerie van Veiligheid en Justitie (VI) voor het jaar*' (2012) 33 000 VI (on file with author) at 3.

74 See the Glossary of key terms set out in Chapter Two at 2.1.3 for the meaning of special terms used.

75 Some research suggests a correlation between international travel for surrogacy and 'commercial' payment: see J. Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls' [2010] *Melbourne University Law Review* 28, which reports on the study by the parent support group 'Australian Families Through Gestational Surrogacy' available at <www.surrogacyaustralia.org>, which surveyed foreign IVF clinics providing surrogacy services to Australian intending parents and found that of 35 international arrangements, 32 arrangements involved payment to the surrogate.

seem possible to travel to a more permissive country to bypass a domestic family law prohibition (this has been referred to as 'evasive mobility').⁷⁶

Some of the countries that have restricted inter-country adoption are engaged in the expanding inter-country surrogacy business. India is one example. India, which has significantly restricted inter-country adoption, including by requiring that 50% of all adoptions be in-country,⁷⁷ is a well-known surrogacy destination.

Second, another factor is that in a number of states (such as the Netherlands), gestational or high-technological surrogacy (in which an embryo created in vitro is transferred into the uterus of a woman who does not contribute the egg) is only allowed if both the intending parents are able to provide genetic material. This is problematic for those couples who are unable to do so and may be inclined to go abroad to engage in a surrogacy arrangement where genetic material from one of the intending parents is allowed.

Third, recourse to a surrogate, in being placed within everybody's reach, becomes a global phenomenon that commands the attention of the domestic legislature. India, certain states of the US (such as California), Thailand (until recently⁷⁸), certain states of Mexico (such as Tabasco⁷⁹), Uganda, and Eastern Europe (such as Georgia, Russia, and the Ukraine⁸⁰) are renowned surrogacy 'hotspots'.⁸¹ It has been reported that the Indian village of Anand, for example, has acquired the nickname '*cradle of the world*': Indian surrogate mothers receive USD 2,500 to 7,000 per birth – the equivalent of 10 years' wages in rural India. The possibility of reproductive 'tourism' in a forum shopping sense is rife.⁸²

76 Considered further in Chapter Three. H. Muir Watt, 'Concurrence d'ordres juridiques et conflits de lois de droit privé', in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, (Paris Dalloz 2005), 615-633. See the list of 61 countries that one California-based surrogacy agency quotes to have had 'experience working with' available at <www.conceptualoptions.com/international-surrogacy>.

77 A. Dohle, 'Inside Story of an Adoption Scandal' [2008] 39(1) Cumberland Law Review 131-186.

78 Note that following highly publicised cases of abandoned babies that occurred in Thailand, it is understood that laws that restrict the practice of surrogacy to altruistic arrangements among relatives domiciled within the country have changed this.

79 As cited on the website of a surrogacy agency at <www.surrogacymexico.com/law>: 'Established in the 92nd Article of Tabasco's Civil Code: In the case of children born as the result of the participation of a gestational substitute mother, parenthood will be presumed by the contracting parent when he/she registers the child's birth, since this action implies the acceptance of the parenthood.'

80 See 'Surrogate Motherhood in Georgia: A Chance for Cash' re-published by the UNHCR Refugee Agency available at <www.unhcr.org/refworld/topic,459e6a502,45a5fac72,46a484dbc,0,,GEO.html>.

81 See 'Surrogate Baby Delivered in India Every 48 Hours', *London Evening Standard* 20 May 2009, available at <www.standard.co.uk/news/investigation-surrogate-baby-delivered-every-48-hours-6724940.html>.

82 R. Storrow, 'The Pluralism Problem in Cross-Border Reproductive Care' [2010] 25(12) Human Reproduction 2939-2943.

1.4 DEVELOPING THE EXISTING RESEARCH

Surrogacy has become an object of multiple debates and a subject of increasing international attention. Outside law, surrogacy has interested commentators in a range of subjects, from psychology,⁸³ sociology,⁸⁴ (bio)ethics⁸⁵ to feminist⁸⁶ studies. Thus far, empirical analysis of issues related to surrogacy has focused primarily on ethical aspects and in the legal research world, principally the private law aspects of surrogacy. In addition to recent domestic initiatives connected to surrogacy arrangements,⁸⁷ several international bodies and a number of academic researchers have been working on inter-country surrogacy projects. Four key research projects must be cited at the outset of this study.

The first is the work of the Hague Conference on Private International Law. The proper forum for unification of PIL is the Hague Conference on Private International Law. The 2010 meeting of the Council on General Affairs and the Policy of the Hague Conference discussed the growing problem of international surrogacy arrangements. The Council, in its Conclusions in 2010, '*acknowledged the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements.*'⁸⁸ The Council agreed that the PIL questions relating to inter-country surrogacy arrangements should be kept under review by the Permanent Bureau. In June 2010, at the Special Commission meeting, the interplay between international surrogacy cases and the 1993 Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption was discussed. The Conclusions of the Special Commission were as follows:

25. The Special Commission noted that the number of international surrogacy arrangements is increasing rapidly. It expressed concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements. It viewed as inappropriate the use of the Convention in cases of international surrogacy.

83 E.g., S. Golombok *et al*, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' [2006] 47 *Journal of Child Psychology and Psychiatry* 213-220; O. van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' [2007] *Human Reproduction Update* 53-62.

84 E.g., E. Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' [2008] 67 *Social Science and Medicine* 1104-1112.

85 E.g., E. Stehr, 'International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation' [2012] *Hastings International and Comparative Law Review* 253-287.

86 E.g., D. Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (New York Oxford University Press 2010).

87 In the context of the Netherlands, for example, see the comparative report for the Dutch Ministry of Justice completed in 2011 by K. Boele-Woelki *et al*, 'Draagmoederschap en illegale opnemings van kinderen' [2012] serie Familie & Recht no. 4, Boom Juridische Uitgevers.

88 Conclusions and Recommendations adopted by the HCCH Council on General Affairs and Policy of the Conference (7-9 April 2010) at 3 available at <www.hcch.net/index_en.php?act=text.display&tid=182>.

26. The Special Commission recommended that the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy.⁸⁹

On 7 April 2011, the Hague Conference's Council on General Affairs and Policy invited the Permanent Bureau to intensify its work on the broad range of issues arising from inter-country surrogacy arrangements.⁹⁰ To date, no decision of the Council on General Affairs and Policy of the Conference has been reached about whether a convention related to inter-country surrogacy will be drafted. Instead, the mandate issued required the Permanent Bureau to gather information on the practical legal needs in the area, comparative developments in domestic law, and the prospects of achieving consensus on a global approach to addressing inter-country surrogacy issues. In March 2012, the Permanent Bureau provided a detailed update on its progress to Council but *'[did] not purport to present a complete picture on this dynamic and complex subject.'*⁹¹ The Permanent Bureau produced its most recent comprehensive report in April 2014,⁹² which incorporates the views of certain members of the Hague Conference and other stakeholders further to the issuance and review of four questionnaires.⁹³ Subject to resources being made available to the Permanent Bureau, the recommendations and policy objectives of further work are as follows:

68. In light of the Study and the above analysis, it is considered that the desirability of further international work – i.e., the need for such work – both in relation to legal parentage generally, as well as concerning ISAs [international surrogacy arrangements] specifically, is clear. [...] further international work might have as its objective to:

1) Ensure legal certainty and security of legal status for children and families in international situations; and

89 The Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (17-25 June 2010) available at <www.hcch.net/upload/wop/adop2010_rpt_en.pdf>.

90 See press release at <www.hcch.net/index_en.php?act=events.details&year=2011&varevent=216>.

91 HCCH Prel. Doc. No 10 of March 2012 (for the attention of the Council of April 2012 on General Affairs and Policy of the Conference), 'A Preliminary Report on the Issues Arising From International Surrogacy Arrangements' at 5-6.

92 HCCH 2014 Study and HCCH study, 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' Prel. Doc. No 3 B of April 2014 (HCCH 2014b Report). Each of these detailed reports is cited and referenced throughout this thesis.

93 These questionnaires circulated by the Permanent Bureau in 2013 to (1) members and non-member interested states (Questionnaire No 1), (2) to specialist legal practitioners (Questionnaire No 2), (3) health professionals (Questionnaire No 3), and (4) surrogacy agencies (Questionnaire No 4). However, compliance to these questionnaires was voluntary, and many states provided limited information, if any. However, the responses of certain states to Questionnaire No. 1 have proven to be insightful (e.g., the Netherlands, Switzerland, and France, in particular) and are cited in Chapter Three.

2) Protect the rights and welfare of children, parents and other parties involved with the conception of children in international situations, in line with established global human rights standards.

Formation of an Experts' Group to facilitate further exploration of the feasibility of a binding multilateral instrument (or possible non-binding measures) in this area. [...]

71. In light of the second objective of further international work, it is considered that the broader concerns which arise particularly in the ISA context (some of which also may arise in non-ISA legal parentage cases), should also be considered carefully by the Group once discussions have progressed concerning the legal status questions and thus there is more clarity concerning the direction of future work and the shape it might take.

In February 2015, the Permanent Bureau drafted 'An Updating Note', which sought to inform members of key developments relevant to its 'Parentage/Surrogacy Project' since the last Council meeting.⁹⁴ In March 2015, the Council decided that an Experts' Group should be convened to explore the feasibility of advancing work in this area and that the Group should meet in early 2016 and report to the 2016 Council meeting. It is submitted that the need to do this further work is underlined by this thesis.

The second project on inter-country surrogacy issues that requires special mention is the study on surrogacy across the EU, which was commissioned by the European Parliament and published in May 2013.⁹⁵ In brief, the report includes empirical analysis in addition to a legal analysis comprising a selection of national legislation and selected case law, relevant European Union law, and PIL. It also contains country reports from 11 countries. An important conclusion made is that '*it is impossible to indicate a particular legal trend across the EU, however all Member States appear to agree on the need for a child to have clearly defined legal parents and civil status.*'⁹⁶ A second conclusion made is that it would be more promising to rely upon international co-operation to facilitate mutual recognition of birth certificates and parental judgments than to draft an EU regulation for surrogacy practices.⁹⁷

94 HCCH Prel. Doc. No 3A of February 2015.

95 L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States', European Parliament (2013) available at <www.europarl.europa.eu/delegations/sv/studiesdownload.html?languageDocument=EN&file=93673> (the 'EU Research Study'). The results and conclusions of the EU Research Study are examined and developed in Chapter Four.

96 *Ibid.*, 1.

97 Further EU-orientated research could be undertaken in the context of the recognition of civil status documents across the EU (see the EU Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) 1024/2012 (COM (2013) 228) available at <[www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0119\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0119(COD))>).

The third project that must be mentioned is the published work of Beaumont and Trimmings of Aberdeen University.⁹⁸ In addition to a workshop,⁹⁹ the study undertaken comprises 25 national reports on surrogacy, an assessment of the practice of inter-country surrogacy, and a general report on issues relating to surrogacy. In the final chapter, the key areas with respect to a possible multi-lateral convention on inter-country surrogacy arrangements are discussed.

The final project that must be highlighted is the work of the International Commission on Civil Status (CIEC). Following a request of the French National Section to address the civil status aspects of surrogacy, a questionnaire was addressed to the National Sections of the other Member States of the CIEC concerning the law and practice of surrogacy, notably as regards the legality of surrogacy agreements and the registration of the birth of the child. On the basis of the replies received and other information in the possession of the CIEC, the Secretariat General prepared a synopsis, which extends also to more general questions relating to the establishment of maternal descent and, notably, anonymous childbirth. This synopsis, written in French and entitled '*L'établissement de la filiation maternelle et les maternités de substitution dans les Etats de la CIEC*' was updated in February 2014.¹⁰⁰

98 K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013).

99 The author participated as a speaker and the UK reporter at an International Workshop on National Approaches to Surrogacy, held at the University of Aberdeen, Scotland, UK between 30 August and 1 September 2011 (the 'Aberdeen Workshop'). The Aberdeen Workshop was organized as a part of a research study into the problems of international surrogacy arrangements that is being carried out at the University of Aberdeen with the financial support of the Nuffield Foundation (for details on the project, see <www.abdn.ac.uk/law/surrogacy/>). The Aberdeen Workshop brought together specialists from a number of jurisdictions to share information on their domestic approaches to surrogacy. There were 23 jurisdictions represented at the Aberdeen Workshop: Australia, Belgium, Brazil, California, Canada, China, Czech Republic, France, Germany, Greece, Guatemala, Hungary, India, Ireland, Israel, Netherlands, Romania, Russia, South Africa, Spain, UK, USA, and Ukraine. The author has had the benefit of discussing parts of this thesis with participants at the Aberdeen Workshop.

100 See <www.ciec1.org/Documentation/EVS-Congres7-Gand-14-15mai2007-MeresPorteusesExposeCNFrancais.pdf>. See also the Annual Report available at <<http://ciec1.org/CIEC-note-information-ENG-MAJ-sept2013.pdf>> ('CIEC Report on Surrogacy').

The need for action in responding to inter-country surrogacy has also been recorded elsewhere.¹⁰¹ The work cited above and other research contributions¹⁰² are clearly of importance for this thesis and will be referred to throughout. While the fundamental rights and interests of children and the parties to a surrogacy arrangement have been identified and key international human rights instruments have been acknowledged, these projects have not comprehensively examined what European and international human rights law actually requires in terms of parentage and nationality the context of inter-country surrogacy.¹⁰³ They are not alone in this approach. Although references to human rights and the

101 E.g., the European Committee on Legal Co-operation (draft recommendation on the nationality of children and the related explanatory memorandum, 10 March 2009); the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (17-25 June 2010); the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions (August 2010); M. Henaghan, 'International Surrogacy Trends: How Family Law is Coping' [2014] 8 Australian Journal of Adoption 9 available at <www.nla.gov.au/openpublish/index.php/aja/article/viewFile/3188/3713>. In August 2014, the International Forum on Intercountry Adoption and Global Surrogacy was held at the International Institute of Social Studies (ISS) in The Hague, Netherlands. The Forum invited experts from around the world to come together and engage in critical discourse about the legal, ethical, and social protection dimensions of both inter-country adoption and global surrogacy. The Forum took place at ISS from 11 to 13 August 2014. The goal was to provide an opportunity for scholars and practitioners to come together to provide an evidence base for international adoption and surrogacy problems and/or best practices with papers to be published following that forum (see <www.iss.nl/research/conferences_and_seminars/periodic_conferences_debates_and_seminars/international_forum_on_intercountry_adoption_global_surrogacy/>).

102 E.g., R. Cook *et al.* (eds.), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003); F. Monéger, *Gestation pour autrui: Surrogate Motherhood* (Paris, Collection colloques Volume 14 2011) at 205; the report prepared by the University of Utrecht's Centre for European Research into Family Law entitled 'Draagmoederschap en illegale opnemings van kinderen' [2012] serie Familie & Recht no. 4, Boom Juridische Uitgevers (K. Boele-Woelki *et al.*) available at <<http://english.wodc.nl/onderzoeksdatabase/draagmoederschap.aspx>>; the 2013 report of the Swiss Federal Council, 'Rapport sur la maternité de substitution', Rapport du Conseil fédéral du 29 novembre 2013 en exécution du postulat 12.3917 du 28 septembre 2012; and in the Swedish national context, J. Stoll, 'Surrogacy Arrangements and Legal Parenthood. Swedish Law in a Comparative Context' (Dissertation, Uppsala University 2013); the International Social Service, see ISS/IRC Monthly Review n. 9/2012.

103 The author is not alone in arriving at this conclusion, *see*, among others, J. Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' [2014] 63(2) International and Comparative Law Quarterly 317. This does not mean that these key projects have not touched upon human rights issues. Part C of the HCCH 2014 Study sets out many of the women's rights issues arising in relation to international surrogacy arrangements (HCCH 2014 Study: 89). The HCCH also identified objectives of further international work, where it states that an objective of international work would be 'to ensure that ISAs [international surrogacy arrangements] are conducted in a manner which respects the human rights and welfare of all those involved with the arrangement' (HCCH 2014b Report, 25). It must also be acknowledged that the HCCH 2014 Study and the research of Trimmings and Beaumont do consider the importance of birth registration and accurate birth records and the right to a nationality but, for various reasons, these projects do not consider this right substantively or provide comprehensive recommendations. Ergas has also considered the necessity of a human rights perspective but normative outputs are not provided; *see* Y. Ergas, 'Thinking "Through" Human Rights: the Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart

best interests of the child are often mentioned, their treatment tends to be more incidental rather than substantive.

Various studies have proposed PIL measures in response to the legal difficulties relating to the recognition of the child's civil status and legal parenthood following a surrogacy arrangement. Such an approach is understandable given the important questions concerning, for example, the existing national tools of recognition of parenthood established abroad and the perceived lack of any consensus as to solutions (whether at the domestic, regional, or international level). Yet, as has been suggested in this introduction and elsewhere,¹⁰⁴ focusing only with the PIL consequences of inter-country surrogacy arrangements does not of itself respond to the multiple legal issues arising from and the realities of the practice nor does it respond to the role of states in managing surrogacy and providing substantive and consistent national responses in accordance with a state's obligations under European and international human rights law. Other important areas that are left unanswered in the research corpus are (i) how best to protect the rights of children; (ii) how to ensure that consent to the process is informed and unconditional and understood in light of the commercial aspects of surrogacy in most cases; (iii) how to consider public policy in the context of inter-country surrogacy; (iv) what is the content of a surrogate-born child's right to information about his or her origins?; and (v) what international standards are states subject to when considering the citizenship of a child born by means of a surrogacy arrangement and, in this context, the prevention of statelessness more generally? These topics are of particular relevance for European states in light of the case law emerging from, for example, the European Court of Human Rights. To build upon the existing research in this fast-evolving subject matter, it is suggested that multi-disciplinary legal approaches are needed.¹⁰⁵

This brings us to the actual point of this thesis.

1.5 RESEARCH QUESTIONS

There is a complete void in the international regulation of surrogacy arrangements, and in the absence of such regulation, highly complex legal problems and challenges arise. The challenges that have been grappled by national courts are plentiful: (i) how to determine parenthood; (ii) nationality and immigration status; (iii) parental responsibility; (iv) the validity, legality, and enforceability of cross-border surrogacy contracts; and (v) the

Publishing 2013), Chapter 27, 427. The EU Research Study also refers to the case law of the European Court of Human Rights.

104 See, among others, EU Research Study, 11; B. Stark 'Transnational Surrogacy and International Human Rights Law' [2012] 18(2) *ILSA Journal of International and Comparative Law*.

105 The author has benefited enormously from each of the contributions cited in exploring the issues in this thesis.

recognition of foreign judgments on parentage and foreign birth certificates. Other challenges not yet known to have been grappled with by national courts but of equal concern are (i) the laws of succession and inheritance; (ii) anti-trafficking and other child protection measures relevant to the lawful transfer of children across borders; (iii) the sanctions available; (iv) the authenticity/falsification of documents (birth certificates, passports, paternity declarations, letters of consent); (v) advertisement; (vi) residence and contact arrangements in the event of divorce or family separation where the parental status of the intending parents is not established; and, more broadly, (vii) the balancing of procreative autonomy and welfare and the role of law in such a personal and intimate area of human life. There are still many open questions relating to the information to be provided to the child in order to respect his or her sense of identity.

As the burgeoning case law from multiple jurisdictions indicates, the legal problems in this area are acute. Case law has demonstrated quite how complex domestic and inter-country surrogacy matters can become and serve as cautionary tales, highlighting the legal, emotional, ethical, and not least the financial consequences of such arrangements to ensure that lessons are learned for the future and that the public expense of these proceedings is not repeated.

The issues identified above have prompted the following main research questions:

1. Do national laws on parenthood and the establishment of nationality at birth sufficiently protect the interests of the surrogate-born child?
2. If not, do existing national rules need to be amended or clarified and/or are new rules or agreed principles or standards at a domestic, regional, and/or international level needed in order to protect the rights of these children in conformity with European and international human rights law?

These research questions beg a number of sub-questions.¹⁰⁶ Does surrogacy change our understanding of motherhood and, more broadly, parenting? Does surrogacy raise particular problems that mean that its regulation (if considered necessary) should differ from other forms of assisted reproduction? What are the grounds for recognising the child-intending parent relationship (e.g., best interests of the child, human rights discourses (such as a right to family life, a right to an identity, or a right to know one's parentage)) and what are the grounds for non-recognition (e.g., public policy)? When is surrogacy against public policy? Who needs to consent to the process and how should this consent be given and recorded? How to distinguish between lawful and unlawful practices? What of the costs and the commercial aspects? And what of the surrogate-born child's right to a nationality?

¹⁰⁶ These questions are relevant both for states of birth (sending countries) and the home state of the intending parents (receiving countries) in the context of inter-country surrogacy.

1.6 RESEARCH AIMS AND VALORIZATIONS

This thesis aims to:

- i. Provide a clear analysis of the specific problems arising from inter-country surrogacy arrangements with a focus on the most prevalent civil status issues (parentage and nationality) and human rights concerns (identity, continuation of relationship rights, and child protection). This investigation will be guided by such questions as what is surrogacy? What are the concerns associated with surrogacy? Why is it an issue requiring international attention?
- ii. Address the gap in the existing research by examining the law on parentage and nationality law in the context of inter-country surrogacy arrangements through the prism of European and international human rights. It is considered that there is a child's rights imperative, and such an approach requires understanding of the ways in which human rights violations may arise throughout the surrogacy process and of the ways in which states' obligations under human rights law are to be implemented. A human rights approach to surrogacy means that all those involved in surrogacy efforts should integrate human rights into their analysis of the problem and into their responses. There is another important reason to consider these human rights aspects in that such a review informs the debate on the application of any public policy exception in cases of inter-country surrogacy. This investigation is guided by the following questions: what are the relevant principles and standards set out in European and international human rights law? When is surrogacy contrary to public policy? Do (commercial) surrogacy arrangements amount to the sale of a child? What does the child's right to a nationality mean in cases of surrogacy?
- iii. Respond to the realities of inter-country surrogacy and explore workable soft law and hard law solutions to the problems presented by surrogacy cases together with possible types of regulation of surrogacy arrangements to minimize risks to children and the types of abuses that may occur. The objective is to consider how parentage and birth right nationality should be regulated in conformity with international human rights standards.

This thesis may serve various purposes.¹⁰⁷ Firstly, it may add value in relation to the ongoing debate concerning surrogacy and the legal development of ideas in how to and why must states respond to this emerging topic. Such work is important given the frequency by which questions about the parentage and nationality of children conceived through surrogacy are being put to judges, legislators, and national authorities. Secondly, it may provide inspiration for the national and international debates concerning how to respond

¹⁰⁷ See also the valorizations to this thesis in Appendix 5.

to surrogacy and, in particular, the consideration of the rights of the child that are implicated in inter-country surrogacy arrangements (parentage and nationality). An examination of the PIL and international children's rights issues reveals that, in theory, some form of coordinated regulation will address many of the potential violations of a child's rights. An examination of the current European and international children's rights movement from the child's point of view, however, reveals considerable schisms between international principles and the status of surrogate-born children. Furthermore, this study provides a micro-comparative study of eight legal systems and their approaches to surrogacy as well as a review of the growing case law and other law-related practices that identifies an application of international human rights law in the fields of parentage and nationality (a first for this subject matter) in cases of inter-country surrogacy. This review should help lawyers, judges, and human rights observers better understand the impact of surrogacy on domestic law. It is hoped that readers of this thesis will be encouraged to raise arguments that are grounded in international and comparative law in their domestic courts and that courts will find the experiences of other courts relevant for that purpose and more broadly. This thesis contributes to the existing research and would appear to be of interest to the national authorities and national and regional courts involved as well as the Human Rights Council, the CEDAW Committee, the Committee on the Rights of the Child, the UN Children's Fund, the UN High Commissioner for Refugees, the International Commission on Civil Status, the European Committee on Legal Co-operation, and the Hague Conference on Private International Law.

It is hoped that this discussion is pertinent to all readers engaged with family law questions, given that the topic under consideration – that is, parentage and nationality through surrogacy and the rights of these children – transcends jurisdictional boundaries.

1.7 RESEARCH APPROACH AND METHODOLOGY

This thesis is predominantly a legal comparative analysis of the legal issues surrounding inter-country surrogacy. Due to the practical focus of this thesis, the research has necessitated a mix of methodological approaches involving a combined library-based and empirical study and a legal dogmatic analysis of the relevant national and international laws:

- i. Legal frameworks and case law – a comparative assessment of national law and case law in the selected research jurisdictions has been undertaken. It is the reported decisions that together make up the 'law' in this area. The research is interested in what decision makers do to respond to and to resolve cases of inter-country surrogacy. While the review of reported cases offers at least a partial answer to the 'law', given the absence of empirical data, the analysis is interested in the factors the courts and national

- authorities are considering in coming to their decisions and how and why they framed their decisions in the way that they did.¹⁰⁸
- ii. Empirical and policy background – statistical data, where available, on the number of surrogacy cases has been researched and a number of interviews with lawyers and surrogacy specialists.¹⁰⁹

The first phase of the research covers the examination of existing domestic legislation (if any), reported case law, and approach to surrogacy in a number of jurisdictions.¹¹⁰ A desk-top review has been conducted. As suggested in this introduction, the national approaches to surrogacy are disparate and broadly fall into four categories¹¹¹:

- i. jurisdictions which are anti-surrogacy,
- ii. jurisdictions where surrogacy is broadly unregulated (without legislation in the broad sense of the term),
- iii. jurisdictions which are neutral or permissive in their approach to surrogacy, and
- iv. jurisdictions which have a permissive approach to commercial surrogacy.

A selection of jurisdictions that fall within these four categories has been considered. For more than one reason (language, time), a broader research basis was not possible. In the context of this research project, eight legal systems have been selected since it appeared from preliminary research that these legal systems manifest the abovementioned differing approaches to surrogacy and have each had decisions of senior courts handed down and/or national reviews published relevant to surrogacy 36 months previously to the writing of this thesis. If a problem among these legal systems has been found, the chance is considerable that the problem also exists in other legal systems. At the same time, the conclusion that there is no problem among these eight legal systems obviously does not guarantee that there is no problem elsewhere. All difficulties or 'problem areas' examined have assisted with the drafting of the recommendations. The jurisdictions¹¹² which are analysed include the following:

¹⁰⁸ It is accepted that there are ethical issues, sampling issues, and other factors such as regional variations and level of court, but it is hoped that this approach will, nevertheless, yield interesting results.

¹⁰⁹ As a practitioner, the author has also undertaken legal advice work for intending parents. In the course of this research and advice work, the author has had occasion to view a number of surrogacy agreements for arrangements taking place in the USA, Mexico, and India.

¹¹⁰ This approach also complements the ongoing research of the HCCH.

¹¹¹ R. Rao categorises the varying approaches in the USA into four types: prohibition, inaction, status regulation, and contractual ordering. R. Rao, 'Surrogacy Law in the United States: The Outcome of Ambivalence' in R. Cook *et al.* (eds.) *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003). Trimmings and Beaumont apply the categorisation set out in this thesis. Given the detailed analysis undertaken in their research, it was believed constructive to adopt the same categorisation for comparative purposes.

¹¹² Excluding the law applicable in any special territories with their own rules, *e.g.*, for the Netherlands, excluding Aruba, Curaçao, Sint Maarten and the islands of Bonaire, Sint Eustatius, and Saba.

- i. jurisdictions which are broadly considered to be anti-surrogacy (states where surrogacy is prohibited and illegal) – France, Switzerland, and Austria;
- ii. jurisdictions where surrogacy is broadly unregulated (states which have made no express provision in their domestic legislation on parentage and nationality) – The Netherlands and Belgium;
- iii. a jurisdiction with a permissive approach to surrogacy (states where surrogacy arrangements are legal but strictly regulated and subject to meeting specific criteria) – the UK; and
- iv. jurisdictions which have a permissive approach to commercial surrogacy – India and the US State of California belong among the few states that permit commercial surrogacy agreements. This list represents jurisdictions that allow for payments beyond reasonable expenses. As a result, these jurisdictions have become highly popular destinations of ‘reproductive travel’.

The inventory itself may provide a useful reference tool for future research. A table summarising the varying domestic approaches to surrogacy is set out in Chapter Three at 3.12.

The objectives of the thesis are achieved largely through the use of primary legal sources. The primary legal sources relied on statute law and regulations, case law, and various international instruments. In relation to Austria and the Netherlands,¹¹³ since most of the primary legal documents are written in German and Dutch, it has been necessary to rely mainly on secondary sources where it concerns the background of the legislation, connected legislation where mentioned, and certain guidelines.¹¹⁴

Other (non-primary) sources of law examined include government reports and guidelines. To enable a broader consideration, the responses to the Hague Conference’s Questionnaire on the abduction, sale of, or traffic in children and some aspects of the practical operation of the 1993 Hague Inter-country Adoption Convention¹¹⁵ as they relate to inter-country surrogacy arrangements have been consulted (a summary is set out at Appendix 3).¹¹⁶

Further sources include books, journal articles and other studies, and information from various government departments. Special focus has been on the relevant documents of the Council of Europe (Conventions, consultation notes, and reports),¹¹⁷ the case law of

113 Jasper Verstappen and Bjorn Brouwer, post-graduate students at Maastricht University Law Faculty, offered excellent assistance in translating several of the Dutch texts into English.

114 The same is true of the Belgian literature, particularly case law, in the Dutch language.

115 Prel. Doc. No 4 of April 2010.

116 State parties to the 1998 Hague Convention on Inter-country Adoption were asked the following question: ‘Have you experienced and problems concerning the interplay between the 1993 Hague Convention and cross-border surrogacy arrangements?’ (*available at* <www.hcch.net/index_en.php?act=text.display&tid=45>).

117 In the field of parenthood, particular reference is given to the Council of Europe’s research 2001 ‘White Thesis’ on Principles Concerning the Establishment and Legal Consequences of Parentage CJ-FA (2001) 16

the European Court on Human Rights (a case selection that is justified later), and detailed working papers of the Hague Conference on Private International Law¹¹⁸ and the CIEC, which have been consulted and referenced extensively.¹¹⁹ Important policy notes produced in a number of EU Member States (France, the UK, and the Netherlands in particular) as well as in Switzerland, the US, Australia, and New Zealand were also consulted.¹²⁰ In addition, the Human Rights Council's database, the database of the Committee on the Elimination of Discrimination against Women, and the database of the Committee on the Rights of the Child as well as State Reports to the Human Rights Council, the Committee on the Elimination of Discrimination against Women, and the Committee of the Rights of the Child were also reviewed.

The empirical element of the research has included personal interviews with surrogacy specialists from selected jurisdictions (legal practitioners and academic researchers (where possible)). Appendix 4 lists the respondents. Informal discussions with child protection specialists at UNICEF were also arranged. Various matters were discussed. These included issues relating to the sanctions available should there be any breach of the requirements, issues regarding the welfare and nationality of the child, matters relating to the kinds and amounts of payments made to the surrogate mother, and child protection concerns.

rev. 'Study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation' (CJ-FA (2008) 5), 'A Report for the Attention of the Committee of Experts on Family Law' by Nigel Lowe Professor of Law and Director of the Centre for International Family Law Studies, Cardiff Law School, Cardiff University, Wales, UK, (CJ-FA (2008) 5). N. Lowe, 'An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law: A Report for the Attention of the Committee of Experts of Family Law' (CJ-FA, 2006); Report of the Council of Europe's Committee of Experts on Family Law tasked to draft one or more legal instruments on the rights and legal status of children and parental responsibilities (CJ-FA (2011) RAP 5). In the field of nationality, particular reference is given to the Council of Europe's 'Study for the feasibility of a legal instrument in the field of nationality law and families (including the promotion of acquisition of citizenship, CDCJ (2012) 11, presented on 11 February 2012. Specifically in the context of surrogacy particular reference is given to F. Monéger (ed.), *Gestation pour Autrui: Surrogate Motherhood*, (Société de législation comparée 2011, Collection colloques, Volume 14); and the research of K. Trimmings and P. Beaumont at Aberdeen University.

118 The HCCH emphasises that its Preliminary Documents and the 2013/2014 Study are not considered 'final' documents, rather, they might be seen as further steps in a process. While a tremendous amount of information has been obtained, there are still important gaps and more work is required to take the project forward.

119 In particular, a report prepared by F. Granet based on the responses of the National Sections to the Questionnaire on 'surrogate mothers' dated 27 October 2009 (LC 6/2009) and a Summary Note dated 26 July 2012.

120 These reports illustrate the awareness of the potential ethical and legal consequences of the development of ART as well as proposals for the legislative actions. In the early 1980, debates on ART were informed by the 'Report of the Committee of Inquiry into Human Fertilisation and Embryology', Department of Health and Social Security, UK, 1984; 'Artificial Conception: Surrogate Motherhood' (Australia), Report by the Benda Commission in Germany (1985); 'Surrogacy. Review for health ministers of current arrangements for payments and regulation' ('Brazier Report'), UK, 1998.

1.8 THE IMPORTANCE OF EUROPE FOR THIS RESEARCH

As discussed above, particular attention is given in this research to the European Convention on Human Rights (ECHR)¹²¹ and the jurisdiction of the European Court of Human Rights (hereinafter, the ‘Strasbourg Court’); the ECHR and this supra-national Court are selected for several reasons. The Strasbourg Court is an active international court, and it exercises authority over 47 states. Moreover, given the judgments handed down by the Strasbourg Court on the topic of surrogacy¹²² and the cases currently pending before it¹²³ as well as the Court’s case law on adoption, parental responsibilities, and medically assisted procreation, this selection should prove illustrative of more macro issues.¹²⁴ The development of the Strasbourg Court’s case law has been influenced by progressive shifts in laws across Europe and policies regarding parenthood and parental responsibilities. Furthermore, the interpretation and application of the rights pursuant to the ECHR have served as a basis for decisions broadening paradigms of parenthood and the family, surviving as a departure from perceived ‘traditional values’.¹²⁵ Since the national laws on parenthood, identity, and nationality influence the family law of the individuals involved, they have to withstand the scrutiny of the ECHR, particularly Article 8 which guarantees the respect for private and family life across the contracting states to the ECHR. The cases of *Mennesson* and *Labassee* concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in parts of the USA between surrogate-born children and intending parents. In both cases, the Strasbourg Court held, unanimously, that there had

121 The ECHR is not a children’s rights instrument per se. As Eekelaar and Dingwall argue, the structure of the ECHR suggests that ‘the minds of the drafters were not directed at the child within the family, but on the relationship between the adult members and the outside world.’ Children and minors are only mentioned twice in the main body of the Convention. See J. Eekelaar and R. Dingwall, *Human Rights: Report on the Replies of Governments to the Enquiry under Article 57 of the European Convention on Human Rights* (1987, Council of Europe) 17.

122 Chamber judgments in the cases of *Mennesson v. France* (Application No. 65192/11) and *Labassee v. France* (Application No. 65941/11). These decisions, together with the cases of *D and Others v. Belgium* (Application No. 29176/13) and *Paradiso and Campanelli v. Italy* (Application No. 25358/12), are considered in Chapter Four at 4.11.3.

123 *Francine Bonnaud and Patricia Lecocq v. France* (Application No. 6190/11), *Stephane Chapin and Bertrand Charpentier v. France* (Application No. 40183/07), *Costa and Pavan v. Italy* (Application No. 54270/10).

124 Note also that the UN Human Rights Committee when adjudicating Article 17 of the International Covenant on Civil and Political Rights looks to the European Court of Human Rights for guidance, see, e.g., *Winata v. Australia*, U.N. Human Rights Comm., Comm’n No. 930/2000, P 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (2001); *Madaffer v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001, para. 4.16 (2004).

125 A separate question is whether ‘traditional values’, to the extent identifiable, underpin human rights. While this question is beyond the scope of this thesis, it is relevant in the context of a discourse of ‘traditional values’ emerging at the international level, e.g., United Nations Human Rights Council passed the resolution A/HRS/16/L.6 entitled ‘Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind’, 24 March 2011. Previous resolutions: 12/21 of 2 October 2009. Later resolution: 21/3 of 27 September 2012.

been a violation of Article 8 ECHR concerning the children's right to respect for their private life. The Court observed that the French authorities, despite being aware that the children had been identified in the USA as the children of Mr. and Mrs. Mennesson and Mr. and Mrs. Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's *identity* within French society. The Court further noted that French law and practice, which completely precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their genetic father, overstepped the margin of appreciation left to contracting states. The surrogate-born children had a right, framed in the context of a right to identity (an aspect of private life), to establish legal filiation with respect to their (genetic) father. These are very significant judgments – firsts for the Court – with significant scopes of application across the contracting states to the ECHR.

1.9 RESEARCH STRUCTURE

This thesis contains six chapters. Chapter One comprises the introduction. The structure of the remaining chapters is the following.

1.9.1 *Chapter Two: Mapping the policy issues*

This chapter is interested in what is surrogacy, the reasons why people turn to surrogacy, the arguments for and against surrogacy, and the business and practice of surrogacy. These matters are explored in order to identify the key public policy issues and to gain some insight into why surrogacy can be difficult to regulate. This approach is taken on the basis that the 'problems' that surrogacy seems to pose for many cannot be understood without an account of the policy and social issues surrounding surrogacy.

This chapter considers that surrogacy has gone from being regarded principally as a vehicle for heterosexual married couples to become parents to being a potential means for expanding all forms of families. Given this development, it is not surprising that the place of surrogacy in family formation is by no means uncontested. Surrogacy signals uncertainty about accepted definitions of family and family formation practices. Indeed, it needs to be acknowledged that many communities are observing the naissance of whole new sets of relationships following surrogacy arrangements that are just beginning to be understood: relationships between surrogates and intending parents; between the surrogate and the foetus; between the gamete donors and the future child; and between the surrogate's family, the intending parents, and the surrogate-born child.

The diversity of perspectives and responses suggests that any proposed solution to the legal problems created by surrogacy is bound to be ideologically embedded. This is evident

in the divergence between what is defined as acceptable practice within different national contexts. The attitudes which support the views expressed in relation to surrogacy, perhaps most notably the assumptions regarding its necessary evils in all cases, may be a product of the lack of empirical research and study and might, upon assessment by individual states in specific cases, be out of step with popular opinion. Recognising this, it is suggested that a more nuanced understanding is required. An important question which emerges is whether arguments against surrogacy, and against any regulation thereof, are equally persuasive. None of the discussions deny that surrogacy raises significant policy (and ethical) questions, which merit close scrutiny or to deny – in the context of inter-country surrogacy – the concerns regarding commodification and exploitation. It is, however, to suggest that common ground can be found, and a framework for regulation is possible. Studies in the area of adoption and the more specific areas of children born by MAR technologies have shown that certainly common elements and shared thought patterns can be found.

1.9.2 Chapter Three: A comparative perspective

The main purpose of this chapter is to explore the national legal rules for establishing legal parenthood and nationality at the time of the child's birth in each of the research jurisdictions, with a view to seeing how the rules apply to inter-country surrogacy arrangements.

In the first part, an analysis of the national rules (if any) and approaches to surrogacy in each of the research jurisdictions are examined. There is an examination of domestic laws on surrogacy and nationality in each of the research jurisdictions in the following order: (i) jurisdictions which are considered to be anti-surrogacy – France, Switzerland, Austria; (ii) jurisdictions where surrogacy is broadly unregulated – Belgium and the Netherlands; (iii) a jurisdiction with a permissive approach to surrogacy – the UK; and (iv) jurisdictions which have a permissive approach to commercial surrogacy – India and California. In addition to the research interviews conducted, explanatory reports, case law, and commentaries in each of the legal systems involved have been consulted.

There are different reasons to start with a description of the substantive law on parentage and surrogacy (if any). First, the PIL on parentage in the context of surrogacy is only relevant to the extent that national legal systems on parentage are different. If the legal systems involved in a particular case provide the same solution, there is no conflict. In order to appreciate the relevance of PIL on parentage and what courts and national authorities are doing to resolve cases of inter-country surrogacy, how the legal systems differ must therefore be examined. Second, the public policy concerning surrogacy in each of the research jurisdictions therefore requires analysis as the application of foreign law or the recognition of a judgment on parentage cannot jeopardise the national public policy

on parentage. The public policy concerns refer *inter alia* to the protection of the family life of the mother and her child (the Netherlands and Austria), the commodification of the child and the exploitation of the surrogate (France), the interest of the child to know his or her genetic and biological affiliation (Belgium, the Netherlands, Switzerland), and certain choices regarding the legal effects of (medically) assisted reproduction (all legal systems). The third reason why it is important to study the law on parentage is that in each of the legal systems, the parentage of a child can be relevant to determine the child's nationality. If a child is parentless, that child may also be stateless.

In the second part of this chapter, attention shifts to consider what conclusions can be drawn from the comparative review. An insight into the differences and similarities of the national rules and approaches with respect to the establishment of legal parentage and the nationality of the surrogate-born child is therefore presented. A key aim is to find any common ground. The second part critically analyses the findings from the national reviews in order to identify the emerging legal problems and protection gaps as well any clear trends and common responses to inter-country surrogacy among the research jurisdictions. What is clear is that the phenomenon of inter-country surrogacy has given rise to a thriving international market.

1.9.3 Chapter Four: Children's rights in inter-country surrogacy

Having looked at how the research jurisdictions respond to inter-country surrogacy, the existing international framework in which the national systems have to function is examined. The treatment of surrogate-born children, the surrogate, the intending parents, and the gamete providers raises clear human rights issues. The findings in Chapter Three illustrate that the practice of surrogacy implicates a number of rights issues, principally, the best interests of the child, a child's right to information about his or her origins, the need for continuity in a personal status to avoid limping family relations, and the informed and free consent of the surrogate.

There is another reason why a consideration of the role of international human rights is examined. Since surrogacy – and inter-country surrogacy in particular – usually has the irreversible effect of severing often legal bonds with the surrogate and establishing family relationships between the child and the intending parents and involves the transfer of children across borders, surrogacy should not be considered lightly.

This chapter seeks to determine how best to understand and to protect the rights of children and the adult parties in inter-country surrogacy by providing content to the relevant principles set out in European and international human rights law; this is because any national approach to inter-country surrogacy must be coherent with and informed by these principles. Human rights provide a set of standards to be met and offer a means

by which to conceptualise inter-country surrogacy and provide a methodology for resolving competing rights. Once the international legal sources relevant to surrogacy have been considered, it becomes possible to determine whether surrogacy is acceptable¹²⁶ and whether it is dealt with effectively and what additional measures, if any, are needed in conformity with European and international human rights law. The objective is to engage in an analysis of the most relevant international instruments in order to provide a comprehensive overview of the current standards and to identify whether there is a normative gap in the protection of surrogate-born children. This chapter maps how the relevant human rights standards are being concretely implemented in order to formulate recommendations for all stakeholders in order to improve the situation of surrogate-born children.

As surrogacy is an international phenomenon, reference is made in this chapter to the principal instruments applying to the regional systems of enforcement of human rights (the European, the Inter-American, and, albeit more briefly, the Arab and the African systems). In view of the growing influence of international and regional organisations, such as the Council of Europe, these organisations and their instruments cannot be disregarded in legal research. International and regional instruments are an integral part of the national systems to which they apply and provide relevant guidelines to the topic of surrogacy. Five international documents require particular reference: the UN Declaration of Human Rights (1949), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), the UN Covenant on Civil and Political Rights (1966), the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW, 1981), and the UN Convention on the Rights of the Child (CRC, 1989). Fundamental rights and interests of the child are implicated, including the right not to suffer adverse discrimination on the basis of birth or parental status,¹²⁷ the right of the child to have his or her interests regarded as a primary consideration in all actions concerning him or her,¹²⁸ the child's right to a name,¹²⁹ and the international prohibition against the transfer of a child for remuneration or any form of consideration.

The relevant international instruments are considered in the order of their regional application, starting with the instruments of the United Nations¹³⁰; then those of the Hague Conference on Private International Law¹³¹; the Council of Europe; and, finally, the

126 This is a key threshold question.

127 Article 2 CRC.

128 Article 3 CRC.

129 Article 3 CRC.

130 The activities of the United Nations organs, such as the UN Human Rights Committee, the Committee on the Rights of the Child, and the CEDAW Committee, will be cited as they provide further interpretation of the provisions contained in the corresponding instruments.

131 It is accepted that the instruments of the Hague Conference are not human rights treaties per se protecting individuals. Instead, as discussed in Chapter Four, they have different aims. The Hague Conventions do, however, help to further the fundamental rights of children, and the analysis is to assess the consequences of human rights standards.

instruments of the European Union. Non-binding instruments such as the work of the Commission on European Family Law are also discussed. Where applicable, each instrument's provisions on (1) the child's rights, (2) the parent-child relationship, and (3) its relevance to surrogacy are discussed. Importantly, although they each have different approaches, scope, and relevance, they share the common guiding principle of the best interests of the child. These instruments provide the core for the analysis of state practice in this research and for developing normative guidelines for the protection of children's rights in inter-country surrogacy.

In the European context, this chapter examines whether the principle of the best interests of the child and doctrine of proportionality (forming part of the assessment of necessity) found in the jurisprudence of the European Court of Human Rights might play a role in dismantling surrogacy prohibitionist laws.¹³² The apparent paradox that results from the Strasbourg Court's approach is that a particular state's rules may, on the basis of an Article 8 ECHR assessment, permit an activity that its own domestic laws may disallow. Yet this human rights dimension does not conflict with the role and positive functioning of PIL. This chapter predicts that a proportionality review of national surrogacy laws (or policy) will lead to a softening of restrictive responses to the recognition of a parental status.

The implications of EU law and free movement provisions in the context of surrogacy are also considered.

The chapter concludes that none of the regional or international instruments discussed forbid surrogacy outright, nor can any of the discussed instruments be interpreted as forming an obstacle to national legislation that allows surrogacy. At the same time, it is accepted that the inevitability of inter-country commercial surrogacy does not of itself justify a permissive regulatory regime if the practice is deemed to be contrary to international law. It is suggested that there is a children's right imperative to work concerning the transfer of children across borders, legal parentage, and a child's identity. As Singer has suggested, establishing legal parenthood, considered in the context of the child's *right* to parents, should be seen as a way of protecting the interests of a child – a right of the child.¹³³ It can be inferred from the notion of the child's right to an identity that national legislation that would prescribe or oppose surrogacy (or fall somewhere in between) must satisfy the requirements of international human rights law. This makes sense, considering, for example, that the child is a rights holder, that is, that the child's best interests need to

132 For more on the topic of proportionality and reproductive travel, see the work and ongoing research of R. Storrow (Cuny School of Law). See R. Storrow, 'The Proportionality Problem in Cross-Border Reproductive Care' in I. Glenn Cohen (ed.), *The Globalization of Health Care: Legal and Ethical Issues* (Oxford University Press 2013).

133 A. Singer, 'The Right of a Child to Parents' in K. Boele-Woelki, N. Dethloff and W. Gephart (eds.), *Family Law and Culture in Europe – Developments, Challenges and Opportunities* (Intersentia 2014), 137-148. See also B. Stark, 'Transnational Surrogacy and International Human Rights Law' [2012] 18(2) *ILSA Journal of International and Comparative Law*.

be considered. However, states may restrict or limit surrogacy (and its consequences) where it is necessary to protect the rights of others and/or protect public morality. Within this context, commercial surrogacy is particularly problematic. Indeed, the margin of appreciation accorded to states when implementing their human rights obligations is such that they could still rely on these arguments to justify the prohibition of commercial surrogacy. Recommendations as to the way forward are provided.

1.9.4 Chapter Five: *The right to a nationality and the prevention of statelessness*

Non-recognition of the parent-child relationship may have a number of serious consequences for the rights and welfare of the child, in particular regarding the child's right to acquire a nationality,¹³⁴ and states' obligations to ensure that children do not end up stateless.¹³⁵ The topic of surrogacy in the context of citizenship is therefore considered in this chapter.¹³⁶ The key questions are the following: Can and should the child acquire the citizenship of his or her intending parent(s)? Can and should the child acquire the citizenship of the state in which he or she was born? How, if at all, is the child's statelessness prevented and what obligations or international standards are states subject to when considering registration as well as the citizenship and status of a child born by means of a surrogacy arrangement? In the context of the child's right to a nationality and obligations placed on states to prevent statelessness, further questions are answered: What happens to a surrogate-born child's loss of nationality on the basis of a change in the child's personal status (e.g., a subsequent determination of parentage in favour of the intending parents)? If a child has been rendered stateless, then domestic law is arguably indirectly discriminatory; for example, it discriminates against children born by surrogacy by omission of the existence of any law protecting them from statelessness in that circumstance.

For a surrogate-born child then, it follows that if the legal parental status of the surrogate and the intending parents is unclear or not possible to determine at the time of the child's birth, the child's right to having a nationality cannot usually be satisfied. The objective is

134 Article 7(1) CRC.

135 Article 7(2) CRC.

136 For a careful assessment of the recent trends in the context of citizenship, see M. Vink and G. de Groot, 'Birth Right Citizenship: Trends and Regulations in Europe' November 2010 EUDO Citizenship Observatory. See also M. Wells-Greco seminar presentation on 'Cross-border surrogacy and nationality: achieving full parent status' convened by the Journal of Private International Law Conference [2011] (Milan); J. Herring, 'Whose Baby Is It Anyway?' [2011] *National Law Journal* 161(7452) 195; N. Gamble and Ghevaert, 'International Surrogacy: Payments, Public Policy and Media Hype' [2011] *Family Law* 41. 504-507; A. Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers' [2008] *Feminist Legal Studies* 141; for judicial consideration of the topic, see *Re X and Y (Foreign Surrogacy)* [2009] 1 *Fam Law* 733 and *Baby Manji Yamada v. Union of India* (JT 2008 (11) SC 150).

to determine whether, under international law, there is an arguable violation of a right to a nationality in citizenship cases of stateless surrogate-born children.

This chapter examines the efforts which have been undertaken at a bilateral, regional, or international level either towards cross-border co-operation in this area or towards a universal right to a nationality and the prevention of statelessness and frames these efforts in order to set out the responsibility of states towards surrogate-born children. Again, recommendations are provided.

1.9.5 Chapter Six: *Where to from here?*

A source of worry is the completely unregulated character of global surrogacy and the perceived policy vacuum within which surrogacy has developed (and is developing) in a haphazard fashion. Addressing this issue, possible types of legal regulation of surrogacy arrangements at both the domestic and international level are explored. This chapter considers whether there is, realistically, any practical way in which surrogacy arrangements could or should be regulated in accordance with the identified European and international human rights standards and, if so, how.

In addition to summarising the findings in Chapters Three, Four, and Five, several conclusions and recommendations are made about connected issues that should be considered when a state is considering the regulation of inter-country surrogacy.

At the international level, the advantages and disadvantages of a formal, binding instrument, such as a convention, or an informal non-binding recommendation or guidelines on minimum standards and/or common principles are discussed. Given the multitude of issues and a need for a global response, a comprehensive international instrument specifically aimed to resolve the challenges of cross-border surrogacy is considered necessary. Yet, given the differing approaches to the legal issues concerning surrogacy, this thesis explores whether and to what extent coordinated soft law approaches – guidelines for best practice and/or common principles – are more likely to be found feasible as a first step for a number of reasons. First, the experience with recommendations and guidelines in other areas of law tends to demonstrate that they are generally followed by states and acknowledged by international courts and human rights-treaty bodies. Second, while it is submitted that there is a case for an international approach, that approach will be best formulated, however, when individual countries have formed their own views. Indeed, the understanding of the needs of surrogate-born children and each of the parties to a surrogacy continues to evolve and deepen; it may be necessary to revise the conclusions of any recommendation in a few years but that would be very difficult if the binding form of a convention were already chosen. Third, the form of a recommendation and general principles and guidelines, being non-binding, leaves the states some flexibility in applying

them, which the special circumstances of surrogate-born children and their families may require. Fourth, a recommendation and general principles offer the advantage of being available to be applied immediately, even pending the entry into force of a convention.

It is submitted that it is arguably better at this stage to put forward soft law solutions which lay the groundwork for hard law responses and are consistent with general practice, identifiable human rights standards, and legal approach already largely accepted by states and which may be politically 'acceptable' in the circumstances but which still address in a meaningful and workable way the parental and civil status of surrogate-born children. Of course, this represents a compromise and will perhaps not placate those who argue for an international treaty response. It is not the intention of this author to argue for something that does not have a realistic chance of being taken up in the immediate future. To argue too broadly too early may even harm the chances of having any co-ordinated suggestion and response to inter-country surrogacy ever being accepted.

1.10 DIFFICULTIES AND RESTRICTIONS

An inherent difficulty of preparing this thesis is to determine its appropriate scope. At one level, it is arguably appropriate to concentrate on the surrogate-born child's position without regard to the positions of the surrogate, gamete providers, and/or the intending parents. Indeed, the starting point for the thesis is that it is in the best interests of the child¹³⁷ to have parents and a nationality at birth and that this interest must be prioritised over an intending parent's interest in becoming a parent. That being so, a child-centred or focused approach is adopted for the purposes of this research. However, the interests of the state, the surrogate (and her family), the intending parents (and their family(ies)), and the gamete providers are also relevant in these policy decisions. Moreover, while it is recognised that issues concerning surrogacy and surrogacy arrangements are multi-disciplinary in nature, it is not feasible to touch upon all of them in a legal thesis that focuses on parenthood, nationality, and children's rights.¹³⁸

Unless otherwise mentioned, establishing legal parenthood refers to establishing the child's legal parents. This thesis therefore concerns only the attribution of parenthood in surrogacy arrangements and not in any other circumstances (e.g., in adoption or ART

¹³⁷ The word 'child' is used throughout this thesis in accordance with the definition contained in Article 1 CRC. In line with the CRC, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

¹³⁸ The practice of surrogacy implicates a number of rights issues, principally, the best interests of the child, a child's right to information about his or her origins, the need for continuity in a personal status to avoid limping family relations, and the informed and free consent of the surrogate and the parties to the surrogacy arrangement. The discussion in this thesis is not (and cannot be) comprehensive of all the dilemmas that may arise; the focus instead is on the key rights issues in the debate.

more broadly).¹³⁹ It deals primarily with the establishment of legal parenthood, with the view of its importance to children since the parenthood determines both the child's legal status and the holders of parental responsibility. The issue of acquisition and content of parental responsibilities and the contestation of legal parenthood are not discussed in detail.¹⁴⁰ This thesis also does not examine other pertinent problem areas such as the determination of the contents of the foreign law and the appreciation of the authenticity of foreign documents.

With respect to the discussion on the effects of surrogacy in terms of nationality, the focus is on birth-right citizenship. This does not mean that birth-right citizenship is the only way of acquiring citizenship, but rather, this restriction reflects an understanding that birth right citizenship is *'the main allocation mechanism to ensure that everybody is a citizen of at least one state. Within the international state system, citizenship laws, and specifically the birth right provisions, function as a key classifying mechanism and they determine, in principle for all persons born into this world, to which state each person "belongs."*¹⁴¹

This thesis does not aspire to address ethical questions surrounding surrogacy. It is based on the premise that as the number of inter-country surrogacy agreements rises, there is an increasingly urgent need for regulation and co-operation at the international level. Nevertheless, it is submitted that the socio-ethical and medical concerns surrounding the surrogacy debate should not be ignored, and many of the first children born by means of surrogacy arrangements are now old enough to speak for themselves. Their insight and experience are crucial to understanding the ways in which MAR technologies have infiltrated culture.

The relationship of the research chapters and the presentation of the chapters should be explained. In order to place the discussion of the human rights framework in context, it was considered necessary to start first with a discussion of how national courts and authorities are responding in practice to inter-country surrogacy. It is hoped that this approach enables the reader to understand the various dimensions of cross-border surrogacy arrangements and the overarching policy perspectives before turning, in this evolving area of practice, to consider the standards of European and international human rights law. A

139 See for a comparative overview of the laws of parentage: K. Saarloos, 'European Private International Law on Legal Parentage: Thoughts on A European Instrument Implementing the Principle of Mutual Recognition in Legal Parentage' (Dissertation, Maastricht University, 2010), 41-44.

140 See more in K. Boele-Woelki *et al*, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007).

141 M. Vink and G. de Groot, 'Birth Right Citizenship: Trends and Regulations in Europe', November 2010 published with the EUDO Citizenship Observatory, 3: 'The fact that most, if not all, citizenship laws typically start with setting out the rules of attribution of citizenship at birth, and only later on in these documents specify rules concerning, for example, declaration and naturalisation procedures, and loss of citizenship, signifies a hierarchy of importance.'

separate chapter dealing with nationality and the prevention of statelessness was also considered appropriate in order to facilitate further discussion by specialist fora, including the UNHCR.

Finally, a word should be said about language. This study is presented in English but concerns the law of several jurisdictions where the vast majority of the research materials are only available in the national languages. Wherever possible, the original wording of the national legislation or the court judgment is preserved. For example, reference is made to ‘intending or intended parent(s),’ ‘commissioning parent(s),’ ‘surrogate,’ or ‘surrogate mother’ where the court has done so or national legislation provides. This may be read as discordant; however, it was felt important to highlight some of the judicial tension around language and the use of disparate terminology.

This thesis takes into account the development of case law, legislation, and doctrine up to 20 November 2014 although some updates and adaptations have been made since that date in order to include reference to the updated work of the Permanent Bureau of the Hague Conference on Private International Law, the Strasbourg Court’s decision in *Paradiso and Campanelli v. Italy*,¹⁴² and to provide additional examples of decisions of senior courts handed down up until 31 May 2015.

¹⁴² Application No. 25358/12. Chamber judgment handed down on 27 January 2015.

2 MAPPING THE POLICY ISSUES

Although the subject of this thesis is principally inter-country surrogacy, there are a number of reasons to start with a description of the policy issues surrounding surrogacy. In order to appreciate how the legal systems differ in their responses (if any) to surrogacy, the reasons for their different approaches must be examined. This chapter therefore considers a series of basic questions: What is surrogacy? How is surrogacy actually defined? And what are the principal arguments for and against surrogacy? The answers to these questions, as presented below, offer an introduction to the topic and simultaneously illustrate that surrogacy, as a practice, merits further careful attention and detailed study.

The following sections intend to provide the common themes expressed in the literature regarding the reasons for seeking surrogacy as well as the arguments for and against surrogacy. An important question that should be considered is whether arguments against surrogacy and against its regulation are persuasive today.

2.1 WHAT IS SURROGACY?

Surrogacy, as a practice, covers a variety of situations where a woman carries and bears a child on behalf of someone else. The word 'surrogate' is likely to have its origin from a Latin word 'surrogatus', meaning a substitute, that is, a person appointed to act in the place of another. A surrogate is a woman who carries a child on behalf of another woman, either from her ovum or (more recently) from the implantation in her womb of a fertilised egg from another woman. The Report of the Committee of Inquiry into Human Fertilisation and Embryology (or the 'Warnock Report' (1984)) termed surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.¹ Drabiak and her co-authors defined commercial surrogacy as '*a contractual relationship where compensation is paid to a surrogate and agency, excluding any reasonable medical, legal, or psychological expenses, in exchange for the surrogate's gestational services*'.² The underlying aim is that the surrogate will hand over the baby after birth to the intending parent(s) and that the surrogate will not exercise parental responsibility³ (or 'parental

1 Warnock Report, 'Report of the Committee of Inquiry into Human Fertilisation and Embryology' (Cmnd 9314, HMSO. London 1984) at 8.1.

2 K. Drabiak *et al.* 'Ethics, Law and Commercial Surrogacy: A Call for Uniformity' [2007] 35 Journal of Law, Medicine and Ethics 300-301.

3 As the CEFL comments (*see* 'Principles of European Family Law Regarding Parental Responsibilities' at 26-27), notwithstanding the use of the term 'parental responsibility(ies)' in various international instruments, including Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the

authority', 'care', or 'custody') over the child in any way. On that reading, surrogacy, as a practice, is aimed to solve childlessness.

Surrogacy is not so new as far as 'new' reproductive technologies are concerned, and it is often noted that the practice dates back to Biblical times.⁴ The Old Testament offers the example of Abraham's infertile wife, Sarah, who commissions her maid Hagar to bear her a child by persuading Abraham to sleep with her. Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her.⁵ Although the story of Abraham, Sarah, and Hagar, read in modern terms, has a number of ugly associations that taint our notion of what surrogacy could be,⁶ what is 'new', however, is that medical advances have now made it entirely possible for a woman to carry a child with whom she has no genetic relationship.

The 2010 Nobel Prize for medicine was awarded to Robert Edwards for the development of IVF.⁷ Edwards realised that laparoscopy (key hole surgery developed by Patrick Steptoe) could be used to extract eggs from women's ovaries in reasonably large numbers. This, combined with hormone injections to bring those eggs to the correct state of maturity before they were removed, meant that women who were infertile because, for example, their fallopian tubes were blocked might have eggs extracted and fertilised outside their bodies by sperm from the man of their choice and the embryos that resulted implanted into their wombs – thus bypassing the fallopian blockage. The result in 1978 was Louise Brown, the first baby to be born following IVF.⁸ This was hailed by some as a medical and scientific breakthrough in fertility treatment but feared by others as a step too far. For the

recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) and Council of Europe Recommendation No. R (84) 4 on 'Parental Responsibilities' and its White Paper on Parentage (see Chapter Four).

4 See French *Senat* Report 2008 at 11: 'Cette pratique de la maternité pour autrui, naturelle car indissociable des rapports charnels, a ensuite traversé les siècles, restant tolérée sans pour autant être reconnue.'

5 See Genesis 16; see also A. McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' [1999] 32 *Vanderbilt Journal of Transnational Law* 271-275.

6 R. Storrow writes: 'First, it associates surrogates with poor, enslaved women, forced to bear children for others and then discarded. Such visions stoke the concerns about exploitation that have been so prominent in debates about the ethics of surrogacy and resound in news headlines about the darkest manifestation of surrogacy: human trafficking. Second, it supports the stereotypical idea of "greedy" intended parents who are incapable of full devotion to children not genetically related to them. Sarah manifests perhaps the worst of this quality, rejecting the child she had intended to rear once the opportunity for genetic parenthood presented itself. In short, the biblical surrogacy story is about one-dimensional women toiling in the shadow of patriarchy, either powerless and exploited or demanding and opportunistic. A worse template for surrogacy could scarcely be imagined. The repugnance we bear toward the slavery, oppression of women, child abuse, betrayal, opportunism, and narcissism is undoubtedly the emotional fuel behind certain calls to reject surrogacy as a means of becoming parents'. R. Storrow, "'The Phantom Children of the Republic': International Surrogacy and the New Illegitimacy' [2012] 20(3) *American University Journal of Gender, Social Policy, and the Law* 588.

7 See the list of Nobel Prize awards at: <www.nobelprize.org/nobel_prizes/medicine/laureates/2010/press.html>.

8 *Ibid.* (see also *BioNews* at: <www.bionews.org.uk/page_155201.asp>).

first time, the possibility that a child might be born to a woman who was not genetically related to that child became a reality.

The first reported gestational surrogacy (that is, no genetic relationship between the surrogate and the child born) in the world occurred in 1984 in California when a woman without a uterus had her eggs transferred to the uterus of a friend who gave birth to the child.⁹ In April 1988, extensive publicity was given to what was said to be the first gestational surrogacy in Australia.¹⁰ The first birth in Israel by a surrogate – who gave birth to twins – took place in February 1998.¹¹

While surrogacy can cover a wide range of different forms, it may be quite different from other reproductive projects in that surrogacy arrangements need not necessarily involve techniques of artificial conception. In a surrogacy arrangement, the child could be born as a result of artificial insemination but could be conceived by natural sexual intercourse as well. It is also possible for the surrogate to carry a child conceived by IVF. That being the case, some place surrogacy within a broader category of collaborative reproduction.¹²

2.1.1 *What are the types of surrogacy?*

As mentioned above, there are two types of surrogacy. The first type of surrogacy arrangement is traditional surrogacy (or ‘low-technology’ or ‘partial’ surrogacy), whereby the eggs of the surrogate are used in the conception of the child. The surrogate is genetically related to the child. The intending father may or may not be genetically related, depending upon whether the couple has used his or donor sperm. In the most commonly reported method used in surrogacy arrangements, the surrogate becomes pregnant as a result of IVF using the semen of the intending father. The pregnancy may also be the result of sexual intercourse between the surrogate and the intending father. This method might be chosen on the basis of preference¹³ or for other reasons. For example, the parties might have been unable to obtain acceptable fertility treatment due to unavailability of AID facilities (perhaps

9 W. Utian *et al.* ‘Successful Pregnancy After an In-vitro Fertilization-Embryo Transfer from an Infertile Woman to a Surrogate’ [1985] 313 New England Medical Journal 1351.

10 There have been a number of press reports and comments concerning a surrogacy arrangement in Melbourne involving conception by IVF, which is said to be the first case of its kind in Australia: ‘Woman to Bear Her Sister’s Baby’ *The Sydney Morning Herald* 8 April 1988.

11 See Israel’s State Report to the Committee on the Rights of the Child, available at: <www.unhcr.ch/tbs/doc.nsf/0/ff05b8854986b0398025662f00567574?opendocument>.

12 See L. Andrews, ‘Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood’ [1995] 81 Virginia Law Review 2305.

13 The case of *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826 concerned a surrogacy arrangement relying on this method.

as a result of legislative prohibitions) or to the reluctance of a local doctor to facilitate artificial insemination for surrogacy purposes.¹⁴

The second type of surrogacy arrangement is gestational surrogacy (or 'high-technology' or 'full' surrogacy). IVF and ET (in vitro fertilisation followed by embryo transfer) may also be used to achieve a pregnancy. Under this method, the ovum of the intending mother or of another woman would be surgically removed and fertilised in vitro and later transferred to the uterus of the surrogate mother. The IVF technique requires a high degree of medical and scientific expertise.

Gestational surrogacy is the seemingly more popular method for at least two reasons.¹⁵ First, it provides an opportunity for a woman who is unable to carry a child to term to have a child who is genetically related to her. Second, by removing a genetic link between the surrogate and the child, it is believed that there will be less chance that the surrogate will refuse to relinquish the child. This may be because of a perceived lesser emotional attachment but also because of a view that the surrogate would be less likely to be the legal parent of the child. Both of these perceptions are open to challenges.¹⁶ Anecdotally, it is understood that most surrogacy agreements '*stipulate that the woman who carries the baby cannot also donate the egg*'.¹⁷

Traditional or gestational surrogacy can also be categorised as being altruistic or commercial (for profit). In broad terms, altruistic surrogacy refers to surrogacy arrangements where the surrogate receives no compensation (or, more accurately, this compensation is limited to reasonable expenses) for carrying and giving birth to a child for the intending parents. This method is most common among family members or very close friends. Commercial surrogacy involves an agreement where a surrogate will receive financial compensation or any other form of consideration for her service beyond payment for reasonable expenses.

However, the line between altruistic and other surrogacy arrangements is very difficult to draw. In both cases, compensation and financial payments will usually be made. However, the financial payments in commercial surrogacy arrangements are often (if not always)

14 J. Stubbs, 'The surrogate mother who gave birth to a couple's dream', *The Northern Star*, 14 May 1983 available at: <<http://m.northernstar.com.au/news/motherhood-surrogacy-ivf-mother-how-to/2185486/>>.

15 There are no firm statistics about the prevalence of either method, but according to Sherrie Smith, program administrator of a surrogacy agency in the USA, only 226 out of 1,355 babies born in their program since 1980 were created through traditional surrogacy; the rest were gestational surrogacies (see A. Kuczynski, 'Her Body, My Baby' *N.Y. Times*, 30 November 2008 available at: <www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html>).

16 See discussion of legal parentage issues that follow. Emotional attachment to the child by gestational surrogate mothers was identified by the Centre for Social Research in its report on 'Surrogate Motherhood: Ethical or Commercial' (2012) available at: <<http://womenleadership.in/images/pdf/SurrogacyReport.pdf>>.

17 L. Ali and R. Kelley, 'The Curious Lives of Surrogates' *News Week*, 7 April 2008 at 47 available at: <www.newsweek.com/curious-lives-surrogates-84469>.

concerned with profit,¹⁸ whereas in altruistic surrogacy, the main object is to help another couple (often a family member or friend) have a child.¹⁹

Surrogacy, however described, is about parenthood.

2.1.2 *Parenthood and ART*

Concepts of parenthood today can broadly be divided into three (often related) categories: genetic, legal, and social parenthood.²⁰

In all cases of surrogacy, the intending parents plan to be the social and legal parents of the child, and at least one of the intending parents is usually genetically related to the child. The different types of relationships that are possible – genetic (either both or neither intending parent), gestational (the surrogate mother), and social (the intending parents) – give rise to challenges regarding the nature of parenthood and legal problems as to who should be considered the parents responsible for the surrogate-born child. Relevant to this discussion is the debate as to whether greater legal recognition should be given to those who are the genetic parents or to those who act socially as the parents of a child.²¹

2.1.3 *Glossary of key terms used in this research*

The complex issue of parenthood in the context of surrogacy and, more broadly, the era of MAR is illustrated in the table below:²²

-
- 18 For the Permanent Bureau of The Hague Conference, the term ‘surrogacy for profit’ is more appropriate. In its 2014 Report, it is noted at footnote 111 that “The term “for-profit surrogacy arrangement” is used in [that] document to replace the term used in the 2012 Preliminary Report of “commercial surrogacy arrangement”. This, it is noted, is due to feedback from intending parent associations that the use of the word ‘commercial’ is offensive for some that have undertaken such arrangements. It was stated that ‘whilst such arrangements may involve compensation beyond expenses for a surrogate mother, they are not usually ‘commercial’ in nature.
- 19 Although each of these types of surrogacies implicates a differing set of questions and consequences, this thesis focuses on the type of surrogacy that places women and children at the heart of a competitive market – international, commercial, and gestational surrogacy.
- 20 See J. Douglas, ‘Marriage, Cohabitation, and Parenthood – from Contract to Status?’ in S. Katz, J. Eekelaar, and M. Maclean (eds.), *Cross Currents. Family Law and Policy in the USA and England* (Oxford University Press 2000) 223-230.
- 21 J. Millbank, ‘Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers’ Rights’ [2008] 16 *Feminist Legal Studies* 141.
- 22 See V. Todorova’s glossary set out in ‘Recognition of Parental Responsibility: Biological Parenthood v. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU action?’ [October 2010] available at: <www.europarl.europa.eu/studies>. The notion to divide the parenthood on the basis of the adult’s ‘contribution’ to the child has been elaborated in J. Eekelaar, ‘Parental responsibility: State of Nature or Nature of the State?’ [1991] *Journal of Social Welfare and Family Law* 36-50 (*legal v. social parent*). A. Bainham, ‘Parentage, Parenthood and Parental Responsibility: Subtle, Elusive, yet Important Distinctions’ in A. Bainham et al. (eds.), *What is a parent?* (Oxford Hart 1999). See

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

International surrogacy arrangements	Definition	Comment
Inter-country surrogacy	An international surrogacy arrangement is one which involves more than one jurisdiction of habitual residence, nationality, or domicile of the intended parents, donors, and surrogates	Also referred to as international, cross-border, or transnational surrogacy
Parenthood in surrogacy arrangements	Definition	Comment
Surrogate	The woman that carries and gives birth to a child	Also known as the gestational surrogate ²³ or mother
Gestational mother	A woman who has carried and given birth to a child following a pregnancy irrespective of whether or not her own genetic materials were used for the conception	
Genetic parent	The man and the woman whose gametes produce the child	Genetic parent may differ from the biological in case of surrogacy (such as in the case of the gestational mother having no genetic relationship with the child born although the surrogate would have a biological connection to a child she delivered)
Social (or psychological) parent	The parent that provides everyday care for/rears the child	
Legal parent ²⁴	The parent recognised by law	
Intending or commissioning parent	The man or the woman who intends to raise the child	They may also but not necessarily be the genetic parents
Co-mother	The partner of lesbian mother that has a parental status	
Co-father	The partner of a gay father that has acquired parental status	
Co-parent	The non-genetic or biological legal parent	While the distinction between parent and co-parent may be

also J. Herring, *Family Law* (Longman 2001) 265-266. Divided parenthood is an enshrined notion in the 2001 'White Paper' on 'Principles Concerning the Establishment and Legal Consequences of Parentage' of the Council of Europe.

23 The glossary of terms used by the ICMART and WHO refers to the 'gestational carrier (surrogate)' as: 'a woman who carries a pregnancy with an agreement that she will give the offspring to the intended parent(s). Gametes can originate from the intended parent(s) and/or a third party (or parties).' See 'International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009' available at: <www.who.int/reproductivehealth/publications/infertility/art_terminology2.pdf>.

24 This thesis is concerned principally with legal parents.

		insignificant in social terms, it retains considerable legal significance
Cohabitant	A person living in an enduring relationship with an adult of the opposite sex or same sex without being married to, or in a registered partnership with, the other person	Can also be referred to as a cohabitee
Concepts related to parentage	Definition	Comment
Parentage	Legal parents (regarded by law as parents) Those who have the rights and responsibilities towards the child	An important question is how national registrars and courts determine the legal parentage of a child in an international situation, while the legal parentage has not yet been established abroad. The answer to this question is not only given by the conflict of law rules on parentage and the selection of the relevant connecting factor but also by the way in which the conflict rule and foreign law is applied. For the outcome of the case, it is relevant to know whether a referral to foreign law includes the conflict of law rules of the foreign legal system (renvoi). It is also relevant to know to what extent different foreign laws on parentage are accepted (public policy exception) ²⁵
Intention		The concept of intentional parenthood used here does not only encompass the intention to conceive but also long-term intentional social parenthood
Renvoi	The question of renvoi is whether a reference to foreign law means a reference to the substantive internal law of that legal system or whether it includes a reference to the foreign conflict of law rules	If a national system of PIL accepts renvoi, it means that a reference to foreign law includes the conflict of law rules of that legal system. There are various degrees in the acceptance of renvoi. Renvoi can be accepted only if the foreign conflict of law rule refers to the applicable law ²⁶ of the forum, as a result of which, the forum law shall be applicable. A more extensive acceptance of renvoi means that the foreign conflict of law rule is also taken into account if it

²⁵ Discussed further in Chapter Three at 3.2.

²⁶ Rules on applicable law are generally designated as conflict of laws or choice of law rules.

	refers to the law of the state of a third state
Sex	Refers to a person's biological status and is typically categorised as male, female, or intersex ²⁷
Gender	Refers to the socially constructed roles, behaviours, activities, and attributes that a given community or society considers appropriate for men and women, e.g. masculine/feminine ²⁸

2.1.4 What is a surrogacy agreement?

Parties contemplating a surrogacy arrangement will often enter into a written surrogacy agreement. The surrogacy agreement is a document (at times referred to as a 'contract') between the surrogate (and her husband, if married) and the intending parents. Central to the agreement is that a baby will be born as a result of the surrogate's consent to carry out and to give birth as well as to hand over the child at birth to the intending parent(s). This agreement typically outlines the parties' obligations throughout the surrogacy process. Common provisions include contemplated medical procedures, contingencies in case of medical complications, compensation, parental rights and responsibilities, and the parties' intent.

The enforceability of a surrogacy agreement is discussed in Chapter Three, but it is worth addressing at this stage that there is a common ground in most jurisdictions that the surrogacy agreement is not legally binding – it is unenforceable. This position is expressed in Section 1A of the UK Surrogacy Arrangements Act 1985: '*surrogacy arrangements are not enforceable in law*'. Two reasons must be cited. First, since there is a common position on the recognition of the legal mother as the birthmother, the surrogate cannot be bound by any contractual obligation to give up the child, i.e. she must have the final and free choice about whether or not to hand over the baby.²⁹ Second, legal parenthood is to be established by law and not by a contract or other private arrangement. Behind these reasons, the commodification of children and the treatment of women's bodies as child-bearing factories are deplored. The Supreme Court of the State of New Jersey in *re*

27 See *The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, adopted by the APA Council of Representatives, 18-20 February 2011. The Guidelines are available on the APA website at: <www.apa.org/pi/lgbt/resources/guidelines.aspx>. See also the definitions of the World Health Organization (WHO) available at: <www.who.int/gender/whatisgender/en/>.

28 *Ibid.*, WHO.

29 Brazier Report 1997, 623-628. See also *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

*Baby M*³⁰ not only declared the surrogacy agreement in that case invalid but also pronounced it evil:

It guarantees the separation of a child from its mother; it looks to adoption, regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.³¹

As discussed in Chapter Three, it should be observed that the surrogacy agreement may have evidential value as information and background to a court to decide on parenthood subsequently to the birth.

2.1.5 Empirical data

It is difficult to determine how often commercial or altruistic surrogacy arrangements occur. Equally difficult to assess is the scope of the problems arising as a result of such activities. However, it is clear from recent reports³² and the case law that cases of surrogacy do reach the courts on a somewhat regular basis. In 2013, the International Social Service estimated that approximately 20,000 children are born annually as a consequence of surrogacy.³³ With respect to the UK, by the end of 2009, Blyth quotes that 725 parental orders had been registered in England and Wales, three in Northern Ireland, and 34 in Scotland.³⁴ There are estimates that as many as 1,000-2,000 children a year are born to surrogate mothers for intended parents in the UK (based on recent figures mentioned in parliamentary debates in autumn 2014). The UK's Children and Family Court Advisory and Support Services have reported that 241 applications were made for parental orders in respect of surrogate-born children in 2014.³⁵ It is estimated that 1,000 surrogacy agreements are entered into each year in the USA.³⁶ With respect to Dutch surrogacy cases, it is reported that the Medical Centre of the Vrije Universiteit Amsterdam receives on average 20 requests

30 537 A.2d 1227 (N.J. 1988).

31 *Ibid.*, 1250.

32 HCCH Prel. Doc. No. 10 of March 2012, 6-8.

33 7 August 2013 available at: <www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/flc-submission-international-social-services-7august2013.pdf>. No source is given.

34 E. Blyth, 'Parental Orders and Identity Registration: One Country Three Systems' (2010) 32(4) *Journal of Social Welfare and Family Law* 345-352.

35 Reported in 'Unregistered surrogate-born children creating "legal timebomb", judge warns', *The Guardian* 18 May 2015.

36 J. Herbie DiFonzo and R. Stern, 'The Children of *Baby M*' [2011] 39 *Capital University Law Review* 345-411.

annually from those wishing to conceive a child using a surrogate.³⁷ Only approximately 10 cases annually actually lead to a course of treatment. On 31 May 2010, three children were born after gestational surrogacy in the Medical Centre, and two more children were expected. The first surrogacy expert centre in the Netherlands, which existed between 1997 and 2004, screened 202 of the 500 couples who expressed an interest in IVF surrogacy. Only 35 couples were given gestational surrogacy treatment, which resulted in the birth of 16 children.³⁸ It would appear difficult to obtain a clear impression of the exact numbers involved in surrogacy (whether commercial or not) and the unlawful placement of children.³⁹ The impression remains that some of these cases simply never reach the surface.

Precise statistics relating to surrogacy are therefore hard to estimate.⁴⁰ The International Federation of Fertility Societies has reported on the growth in the number of countries offering ART generally: this is based on research that the number of countries submitting data concerning ART had risen from 59 in 2007 to 105 in 2010.⁴¹ In many countries, given the absence of legal provision, regulation, or licensing regime for either ART or surrogacy, formal reporting mechanisms on these arrangements are unlikely, if indeed they are available at all. Although it is, therefore, unlikely that precise figures will ever be known, all estimates point towards surrogacy being an issue of increasing global proportions and reach and that this practice does in fact occur and that it is not particularly rare.

2.2 ARGUMENTS OVER SURROGACY

2.2.1 *Arguments against surrogacy*

The principal arguments against surrogacy include the commodification of women and children, the exploitation of women (including the medical risks), and long-term harm to children (including identity issues); these are considered below.⁴²

37 'Vaststelling van de begrotingsstaten van het Ministerie van Veiligheid en Justitie (VI) voor het jaar' (2012) 33 000 VI (on file with author) at 3.

38 *Ibid.*

39 No empirical data appears to be publicly available with respect to India or California.

40 See also the comments in the EU Research Study.

41 The International Federation of Fertility Societies, 'IFFS Surveillance 2010' (available at: <www.iffs-reproduction.org/documents/IFFS_Surveillance_2010.pdf>). This survey concluded that 'ART has spread to distant parts' (at p. 1) and noted that '[a]mong the 103 nations with reliable information on this point, 42 operated [ART] with legislative oversight, 26 with voluntary guidelines, and 35 operated with neither' (at 10).

42 For a multidisciplinary consideration of the issues, see R. Cook *et al.* (eds.) *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003).

Edwards and Steptoe were accused in the 1970s of playing God by the Roman Catholic Church and other religious groups.⁴³ Steptoe responded to the criticism of his work by stating: *'I am not a wizard or a Frankenstein. All I want to do is help women whose child producing mechanism is slightly faulty'*.⁴⁴ There are still many who oppose all forms of infertility treatment and surrogacy. Their reasons for opposition are diverse, ranging from a deeply religious belief that children should be born only as a result of sexual intercourse between husband and wife, to fears that we come closer to the *Brave New World* depicted by Aldous Huxley or to Gilead (the tyrannical republic of Margaret Atwood's *The Handmaid's Tale*), both of which depict dystrophic worlds where child-making is performed by either mass incubators (Huxley), subjugated hand-servants (Atwood), or 'womb tanks' (Mitchell).⁴⁵

The members of the UK's Warnock Committee declared in 1986 that surrogacy is 'totally ethically unacceptable' for the following reason: *'That people should treat others as a means to their own ends, however desirable the consequences must always be liable to moral objection'*.⁴⁶ The German Working Group on IVF declared in its report in 1985 that they had general reservations about surrogacy, saying that a surrogacy arrangement:

Fails to respect the human dignity of the child by ignoring the fact that its development in the uterus is an important part of the development of the child's personality, and that the biological and psychological bond between the child and the woman carrying it is of special significance for this development. This special kind of relationship, arising out of the natural link between the unborn life and the life of the mother, would be impaired if the pregnancy were entered into as a performance of some kind of service.⁴⁷

In February 1987, the Vatican issued a statement rejecting surrogacy, finding that it is not morally acceptable because it is contrary to the unity of marriage and the dignity of procreation of the human person. The statement, issued by the Sacred Congregation for the Doctrine of the Faith, declared that surrogacy offends the dignity and the right of the child

43 F. Golden, 'Patrick Steptoe and Robert Edwards: Brave New Baby Doctors' in *Time* 29 March 1999, available at: <<http://content.time.com/time/magazine/article/0,9171,990605,00.html>>.

44 *Ibid.*, 155.

45 See R. Storrow, 'The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception' [2005] 12 *Texas Wesleyan Law Review* 189-204; D. Mitchell, *The Cloud Atlas* (Sceptre 2012).

46 Warnock Report at para. 8.17. In an article critical of the Warnock Report, Freeman has pointed out that this reasoning would also lead to the rejection of blood transfusions; see M. Freeman, 'After Warnock - Whither the Law?' [1986] 49 *Current Legal Problems* 33-36.

47 Ad Hoc Committee of Experts in Progress in the Biomedical Sciences Report of the Working Group on 'In Vitro Fertilization, Genome Analysis and Gene Therapy' [1985].

to be conceived, carried in the womb, brought into the world, and brought up by its own parents.⁴⁸ According to this view, surrogate motherhood leads to the detriment of families.

Commodification argument

One of the strongest arguments against permitting surrogacy arrangements, particularly the development of commercial surrogacy, is that they create a market in children (resulting in the selling of children) and the surrogate's reproductive labour becomes a commodity such that the child becomes a product to be bought and sold. The concerns about surrogacy arise from a distaste for what some perceive as a system whereby babies and/or human eggs and sperm are 'bought' and 'sold' and women - 'gestational carriers' - give birth under 'rent a womb' arrangements in circumstances where possibly both the surrogate (perhaps in the absence of alternative work) and intending parents are being financially and emotionally exploited.⁴⁹ Scott has etched that picture referring to the '*dramatic and emotional legal battle between a housewife who had dropped out of high school and a couple with graduate degrees and professional careers who sought to have a child with her assistance*'.⁵⁰ In what concerns the commoditisation of reproduction, a fundamental question must be asked: How can there be a voluntary and autonomous act in the offer of a woman to work as a surrogate while facing severe economic constraints? Surrogacy is therefore not simply a question of freedom versus emancipation or reproduction versus production, but rather what constraints and opportunities simultaneously impose decisions in the context of a global competitive marketplace.

Within this wider discourse, the practice of surrogacy has also been the subject of feminist criticism, as Rothman notes, for commodifying women's reproductive labour and reinforcing a multitude of structural power imbalances.⁵¹ Jolly argues that '*the globalization of motherhood is thus simultaneously sign of the profound inequalities between rich and poor, developed and developing, North and South, and their divergent fertility regimes and differential relation to the global bio-economy of assisted reproduction*'.⁵² Surrogacy

48 Sacred Congregation for the Doctrine of the Faith Instruction on Respect of Human Life in its Origin and on the Dignity of Procreation (1987) at 39 (*available at*: <www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html>).

49 *The Economist*, 'Buying Babies, Bit by Bit. An International Guide to Baby-Making' published on 19 December 2006 *available at*: <www.economist.com/node/8345513>.

50 E. Scott, 'Surrogacy and the Politics of Commodification' [2009] 72 *Journal of Law and Contemporary Problems* 109-111 (showing that this has occurred with surrogacy arrangements because both politicians and the judiciary realised that these arrangements are here to stay).

51 B. Rothman, 'Reproductive Technologies and Surrogacy: A Feminist Perspective' [1992] 25 *Creighton Law Review* 1599-1615.

52 M. Jolly, 'Divided Mothers: Changing Global Inequalities of "Nature" and "Nurture"' in J. Maher and W. Chavkin (ed.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care* (Routledge 2010) 154-155.

may thus represent a venue for abuses and violations of fundamental rights.⁵³ At a macro level, there is a concern that the principles of dignity and equality are threatened if (in market terms) there is a financial value placed on human life and gestation.

Exploitation argument

Critics of surrogacy point to the exploitation that surrogates may be subject to. This is especially possible in inter-country surrogacy arrangements where the surrogates are usually from poorer backgrounds than those of the intending parents. When women can seemingly earn more than their husbands' annual income from one surrogate pregnancy, there may be pressure (directly or indirectly) to consent to a surrogacy as a result of the realities of their socio-economic circumstances or the pressure of family members.⁵⁴ This raises the broad question of whether women are really exercising free and informed choice or whether a lack of financial alternatives gives surrogates no other feasible option.⁵⁵ Their vulnerability in these circumstances leaves surrogates potentially susceptible to exploitation from others who seek to benefit from the arrangement: the surrogates' families, intermediaries, and clinics involved in the surrogacy arrangement and the intending parents. Inequality in bargaining power between wealthier intending parents/clinics and surrogates, geographical differences and disparities in literacy levels, and a lack of legal and medical knowledge by the surrogates also create conditions that may lead to exploitation. For example, there have been reports as to the absence of interpreters for surrogates in developing countries.⁵⁶

The issue of exploitation of the surrogate therefore resolves into the fundamental question of her autonomy and her capacity to foresee the risks entailed. The UK's Brazier Report notes that '*[p]ayment increases the risk of exploitation if it constitutes an inducement to participate in an activity whose degree of risk the surrogate cannot, in the nature of things, fully understand or predict*'.⁵⁷ To quote the European Parliament, in its resolution on the priorities and outline of an EU policy framework to fight violence against women, the Parliament:

20. Asks Member States to acknowledge the serious problem of surrogacy which constitutes an exploitation of the female body and her reproductive organs;

53 See, generally, J. Maher and W. Chavkin (ed.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care* (Routledge 2010).

54 See J. Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' [2014] 63(2) International and Comparative Law Quarterly 317.

55 See also the comments of M. Henaghan, 'International Surrogacy Trends: How Family Law is Coping' [2014] 8 Australian Journal of Adoption 9, at 5.2.

56 A. Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Account of Indian Surrogacy' (2011) 26 Hypatia 715; *Mason and Mason & Anor* [2013] FamCA 424, paras. 3-4.

57 Brazier Report at para. 4.25.

21. Emphasises that women and children are subject to the same forms of exploitation and both can be regarded as commodities on the international reproductive market, and that these new reproductive arrangements, such as surrogacy, augment the trafficking of women and children and illegal adoption across national borders [...].⁵⁸

As suggested above, the potential for exploitation with surrogacy, on the other hand, exists primarily for economic reasons. As reproductive technology is a growing business, there are opportunities for large profits for third parties such as intermediaries, brokers, and ART clinics. This, combined with the strong desire of intending parents to overcome their childlessness, may provide a compelling incentive to manipulate the surrogate and, where relevant, the egg and/or sperm donors. Considered in that light, a high-risk group are surrogates. The case of Nirmala, a woman from Chandigarh, India, illustrates this reality.⁵⁹ In 1997, Nirmala announced that she would carry a child for 50,000 Rupees (approximately EUR 720) and use the money to obtain needed medical treatment for her paralysed husband.⁶⁰ Cases such as Nirmala's highlight the risk that some surrogates may feel forced into the arrangement because of limited employment opportunities and the realities of their life circumstances.

Surrogacy may involve identifiable risks to the child, to the surrogate, and to the intending parents. Attention should therefore be given to the possible vulnerability of each of the parties to these arrangements, raising concerns regarding money, exploitation, and the difficulties, which may arise as a result of unregulated practices and intermediaries. For example, 2011 saw the convictions of three individuals who sent 'surrogates' to Ukraine for implantation with embryos without any surrogacy arrangements in place and who subsequently 'sold' the unborn children.⁶¹ Clearly concerns in this area are not limited to a narrow category and include the trafficking of women and children⁶², as well as concerns

58 5 April 2011, 2010/2209(INI) available at: <[www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2010/2209\(INI\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2010/2209(INI))>.

59 S. Srinivasan, 'Surrogacy Comes Out of the Closet' *Sunday Times of India* 6 July 1997, available at: <www.womenstudies.in/elib/fertility/frsurrogacy-comes.pdf>; see also J. Gupta, 'Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies' [2006] 13 *European Journal of Women's Studies* 23-30.

60 For another tragic example, see <www.smh.com.au/national/named-the-australian-paedophile-jailed-for-40-years-20130630-2p5da.html>.

61 See <www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted>.

62 See, e.g., the 'Model Law against Trafficking in Persons', developed by the United Nations Office on Drugs and Crime to assist States with the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (entry into force 25 December 2003, Protocol to the United Nations' Convention against Transnational Organised Crime of 29 September 2003) which specifically mentions 'forced pregnancy' and the 'use of women as surrogate mothers' as, in certain circumstances, possible examples of 'exploitation' which states may wish to consider when legislating to criminalise 'trafficking' available at: <www.unodc.org/documents/humantrafficking/UNODC_Model_Law_on_Traffick-

regarding private arrangements. There have already been links made between commercial surrogacy and trafficking of children.⁶³ It has been reported in the media that an Israeli man, previously convicted of sex offences against young children, has legally gained custody of a girl, through a surrogacy arrangement with an Indian surrogate. The issue was brought to the attention of the Israel National Council for the Child, an NGO for children's rights following an anonymous tip off.⁶⁴

2.2.2 *The effects of surrogacy on the child*

It is argued by some that society has a responsibility to prohibit surrogacy in order to prevent children being born in undesirable circumstances and the future violation of the human dignity of children.⁶⁵ Moreover, no known information exists about the long-term psychological consequences for children born as a result of a surrogacy arrangement. It is not known, for example, how the child will feel upon learning about the surrogacy arrangement and the impact this will have on that child's emotional development and identity through childhood and into adult life. This is exemplified, *inter alia*, by concerns that these children, particularly in cases of inter-country surrogacy, might have problems exercising their right to trace genetic and/or biological origins.⁶⁶ The term 'genealogical bewilderment' could be borrowed from the adoption field.⁶⁷ Some children born through

ing_in_Persons.pdf>. Other reported examples of trafficking relating to surrogacy include, *e.g.*, Polish women reportedly recruited to travel to the Netherlands, Belgium, and Germany (<www.independent.co.uk/news/world/poles-hired-as-surrogate-mums-in-illegal-trade-1584960.html>); women from Burma sold to Chinese men to work as surrogates as part of a trafficking scheme *as available at*: <www.china-post.com.tw/china/local-news/other/2009/03/26/201716/China-returns.htm>); concerns regarding practices in Guatemala (*see, e.g.*, the European Parliament's Joint Motion for a Resolution on Guatemala (6 July 2005) which stated that: 'the abuses occurring in Guatemala include forced or surrogate pregnancies [...]') (source: 'Memorandum: Is there a need to regulate Inter-country surrogate-pregnancy agreements in private international law?', written under the instruction of Peretz Segal, Ministry of Justice Israel, by J. Chernick, B.A. Stanford University 2009).

63 See 'Taiwan company accused of trafficking Vietnamese women to breed', *available at*: <<http://mobile.globalpost.com/dispatch/news/regions/asia-pacific/thailand/110310/thailand-surrogacy-human-trafficking>> and <www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffic-vietnam-women-breed/?page=all>.

64 N. Barkan, 'Convicted paedophile raises surrogate daughter', *Ynet* 6 June 2013, *available at*: <www.ynet-news.com/articles/0,7340,L-4387303,00.html>.

65 P. Singer and D. Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford Paperbacks 1984) 119.

66 Martin has commented that the surrogate-born child may be confused about his or her identity. J. Martin, 'Surrogate Motherhood and Children's Interests' [1990] 15(4) *Children Australia* 40-46.

67 H. Sants, 'Genealogical Bewilderment in Children with Substitute Parents' [1964] 37 *British Journal of Medical Psychology* 133-141.

surrogacy may suffer feelings of disconnection from their origins.⁶⁸ Furthermore, children who discover that their surrogate mother has had other children as part of a surrogacy arrangement may find this information difficult to accept. State-based legislation in some jurisdictions that criminalise families turning to surrogacy abroad may induce some (particularly heterosexual) families to conceal the nature of their child's origins to both the child and third parties. Such legislation also makes it likely that many children born through surrogacy will later discover that their manner of gestation was conducted outside the law.

It is suspected that in many cases, donor eggs are required by those using surrogacy abroad. These are mostly acquired from donors who have not agreed to their identity being released and have often provided only limited medical history. Intending parents will often have only a first name, brief personal and medical details, and a picture of their donor to share with their child as they grow up. In a UK study by Jadv, Blake, Casey, and Golombok, of 42 heterosexual parents who used traditional surrogacy, just under half did not disclose the use of the surrogate mother's egg, and thus, the child was unaware that the surrogate mother was their genetic mother.⁶⁹ Findings from another study of infertile women planning on using surrogacy to start a family showed that most women would disclose the use of surrogacy but not the use of gamete donation, suggesting that intending parents find it more difficult to disclose the use of third-party gametes than the use of third-party gestation.⁷⁰

2.2.3 *The effects of surrogacy on the surrogate*

The woman who agrees to carry a child for others may be quite vulnerable for a number of reasons.⁷¹ Payments may operate as an inducement to enter into surrogacy for women

68 Research evidence about identity formation and crisis appears inadequate. As such, it is impossible to make many assumptions about this issue and the welfare or well-being of the child. Further research is recommended.

69 V. Jadv, L. Blake, P. Casey, and S. Golombok, 'Surrogacy Families 10 years on: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' [2012] 27(10) Human Reproduction 3008-3014.

70 O. van den Akker, 'The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK' [2000] 15 Human Reproduction 1849-1855.

71 HCCH Prel. Doc. No 11 of March 2011 at Section VI(a). See the study by the Centre for Social Research, India (*available at*: <www.csrindia.org>), 'Surrogate Motherhood – Ethical or Commercial' (March 2012). Based on interviews with 100 surrogate mothers, 50 intending parents, and clinics, many concerns were reported including: surrogates were often illiterate and relied on clinics to inform them of the terms of the contract, with no independent advice; contracts were often not signed until mid-way through the fourth month of a pregnancy; clinics often were not party to the contract, allegedly to avoid accountability; the overwhelming majority of surrogates indicated that they had decided to become a surrogate due to 'poverty'; there were concerns about pressure from others (e.g. agents, husbands) to become a surrogate; and a lack of transparency regarding the fees paid to surrogates, with the report concluding: 'The payments to surrogate

suffering financial hardship. It is possible that more economically disadvantaged women could be used to carry the children of wealthier adults; some would see this as a serious form of exploitation. If financial pressures have prompted her to contemplate acting as a surrogate, she could be at even greater risk if for whatever reason, the intending parents do not pay her as agreed.

Social and religious stigma may exacerbate problem issues. Victims may also be in danger or threat of retaliation from brokers and others involved in organising the arrangements.⁷² It should be acknowledged that surrogacy creates opportunities for exploitation, stigmatisation, and violence against women.

Even in cases of altruistic surrogacy within families, there is danger that the surrogate could have been under significant emotional pressure to demonstrate family loyalty by carrying a child for her sister or other family members. There is a risk of undervaluing the gestational process and caregiving relationship between the surrogate and foetus.

With any surrogacy, a surrogate exposes herself to life and health risks⁷³ whether arising from complications of pregnancy or otherwise. The development of medical problems such as high blood pressure and diabetes or complications of the pregnancy such as bleeding or premature labour is not uncommon. They may result in the need for medical treatments such as drugs or a blood transfusion. In addition, problems during the pregnancy or labour may require an operative delivery of the child. All these problems can seriously affect the health and quality of life of the surrogate during the pregnancy and may also have effects beyond the pregnancy. It is also likely that, during pregnancy, the surrogacy arrangement will impose considerable constraints on her lifestyle, diet, travelling, and other activities. In May 2012, Premila Vaghela, a surrogate, was in the eighth month of a surrogate pregnancy when she died of heart complications. The detail surrounding her death remains unclear. A boy was delivered by caesarean section at an ART clinic in Gujarat. Premila Vaghela was then sent, in critical condition, to another hospital. It is reported that she was unable to be resuscitated shortly after.⁷⁴

mothers are arbitrarily decided by the infertility physician of the clinic / hospital in all cases'. Similar concerns also come to light in the documentary 'Made in India' (see <www.madeinindiamovie.com>). See also: 'Surrogacy can be just another form of slavery', *The Irish Times* 25 February 2012, available at: <www.irish-times.com/newspaper/opinion/2012/0225/1224312372861.html>.

72 For a multidisciplinary discussion of the issues, see S. DasGupta and S. Das DasGupta (eds.), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014).

73 E.g. side effects of hormonal stimulation, twin and higher-order pregnancies, repeat pregnancies, and medically unnecessary caesarean sections.

74 Conflicting reports exist of her age, previous medical condition, and how many embryos had been implanted. See, for example, <http://articles.timesofindia.indiatimes.com/2012-05-17/ahmedabad/31748277_1_surrogate-mother-surrogacy-couples>, <www.guardian.co.uk/commentisfree/2012/jun/05/india-surrogates-impo-verished-die>, and <www.bioedge.org/index.php/bioethics/bioethics_article/10062>; N. Lal, 'Pitfalls of Surrogacy in India Exposed' *Asia Times Online* 24 May 2012 as at <www.atimes.com/atimes/South_Asia/NE24Df02.html>.

Pregnancy and childbirth is usually a very personal and emotional experience. Both intending parents and surrogates regard the surrogate's 'job' as protecting and nurturing a developing life before separating from it at birth. Once the child is born, the surrogate is expected to deliver the child to the intending parents. This undertaking may raise its own problems. For example, a (small) number of surrogates have refused to hand over children they had – it is assumed – agreed to carry for the intending parents.⁷⁵ In these cases, the surrogates have formed an attachment to the child they were carrying. Some would argue that it would be wrong to deny a woman the right to bring up a child she has given birth to, even in the absence of any genetic relationship with that child (or those children). If the surrogate does hand over the child as presumably agreed, there is a real possibility of emotional suffering brought about by the loss of the child.

Consideration must also be given to the effect the surrogacy arrangement might have on the relationship between the surrogate and her family. Even if her husband or partner approves of the arrangement, the possible stress on their relationship should not be ignored. This will be exacerbated if the arrangement breaks down for any reason and any children of the surrogate may feel threatened.⁷⁶ Equally troubling are reports that some surrogates live in enforced isolation, separated from children and their families subject to constant monitoring of diet, sleep, and mobility.⁷⁷

2.2.4 *The effects of surrogacy on the intending parents*

The intending parents could well be placed at a considerable disadvantage. Their dependence on the intermediary and the surrogate could leave them open to the risk of emotional or financial pressures if the surrogate refuses to hand over the child or if the surrogate threatens to delay doing so.⁷⁸ In addition, the threat of exploitation by an intermediary or other parties is a risk. In one reported case in the UK, a woman agreeing to act

⁷⁵ See Chapter Three.

⁷⁶ S. O'Brien, 'Commercial Conceptions: A Breeding Ground for Surrogacy' [1986] 65 North Carolina Law Review 127, 144.

⁷⁷ See M. Darnovsky, 'An International Agreement on Commercial Surrogacy?' *Bio-political Times* 4 September 2014 available at: <www.biopoliticaltimes.org/article.php?id=8036>; M. Darnovsky, 'Forum on Cross-Border Surrogacy, Adoption Attracts Scholars, Human Rights Activists and Policymakers', *Our Bodies Our Blog* 18 September 2014 available at: <www.ourbodiesourselves.org/2014/09/international-forum-cross-border-surrogacy/>. See also D. Deomampo, 'Beyond "Wombs for Rent": Indian Surrogates and the Need for Evidence-Based Policy', *Somatosphere* 5 June 2014, available at: <<http://somatosphere.net/2014/06/beyond-wombs-for-rent-indian-surrogates-and-the-need-for-evidence-based-policy.html>>.

⁷⁸ In *P.M.G. v. J.M.A.*, No. 27-PA-FA-05-278, 2007 WL 4304448, 1 (Minnesota Court of Appeal, 11 December 2007) (surrogacy contract provided for payment of USD20,000, but the carrier threatened to abort the foetus unless she was paid an additional USD120,000).

as a surrogate and then faking the pregnancy was jailed for three years for fraud.⁷⁹ Given the paucity of data that consider the number of instances of failed surrogate arrangements, it should be noted that intending parents face the possibility of severe distress if the arrangement is not carried out.⁸⁰ Relevant guidelines of the UK Foreign and Commonwealth Office⁸¹ note:

Surrogacy has an important role in allowing intended parents to bring up a child when for whatever reason they are not in a position to have children themselves. It is also a lucrative business to clinics and individuals providing surrogacy services overseas. Several cases have come to light where there is no genetic link between the intended parents and the child born through a surrogacy arrangement. [The Foreign and Commonwealth Office recommends] that you make sure that you work with a reputable clinic which can satisfy you at an early stage that the child is genetically linked to you. In some countries clinics are able to register with national authorities and we recommend that you research this fully.

Please be aware that some foreign clinics and individuals have in the past provided fraudulent documents for the surrogate mother.

Finally, intending parents need sufficient and accurate information so that they are adequately prepared to make the decision whether to engage a surrogate. The Hague Conference has expressed concern about misinformation given to intending parents by clinics and agencies.⁸²

2.2.5 *The effects of surrogacy on gamete providers*

Gestational surrogacy arrangements are often dependent on the use of gametes provided by persons other than the intending parents. The Permanent Bureau of the Hague Conference has acknowledged that both '*physical and psychological risks to any egg and sperm donors [...] have to be taken into consideration*'.⁸³ In the context of surrogacy, it is likely

⁷⁹ It is reported in the press that she dealt with couples who were struggling to have children and offered to be a surrogate for them. She would pretend to have inseminated herself and provide a positive pregnancy test from a friend. After a period of time she then pretended to miscarry: see <www.westerndailynews.co.uk/Fraudster-Louise-Pollard-jailed-pretending/story-21243552-detail/story.html>.

⁸⁰ See, e.g. the New Jersey (USA) case of *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988) (discussed in Chapter Three at 3.10).

⁸¹ UK Foreign and Commonwealth Office, 'Surrogacy Overseas' available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/324487/Surrogacy_overseas__updated_June_14_.pdf>.

⁸² HCCH 2014 Study, 90.

⁸³ HCCH 2014 Study, 89.

that the use of third-party eggs (to respond to female infertility) is more common than use of third-party sperm. In this context, the health and medical issues with respect to donors should not be ignored as should the requirement of meaningful informed consent of these gamete providers. As discussed above, from the perspective of the surrogate-born child, there is recognition that children have the right to information about their origins, and, in that context, the anonymity of gamete providers is problematic. At the same time, the privacy of the gamete providers is an important consideration.

2.2.6 *Arguments for surrogacy*

The factors which might influence people to explore the possibility of a surrogacy arrangement are examined below. The reasons for resorting to surrogacy may vary significantly. There are couples who, for various reasons related to infertility, illness, or disability, are unable to have a child by conventional means. In addition, surrogacy provides a means for same-sex couples to become parents and/or fulfil a wish to have a child who is genetically related to one of the intending parents. At the other end of the spectrum are those persons who decide to undertake surrogacy for reasons of personal convenience. There is little published data available on the reasons prompting a couple to seek to become parents in this way. However, based on the reported cases, relevant academic literature, and from the interviews with the specialists conducted, what has emerged is that many couples do so principally because of a biological or genetic impossibility.

In addition to the argument that no child's very existence should be subject to a taint of criminality, the clearest argument in favour of permitting surrogacy arrangements is that they allow couples who want a family, but who were prevented from having one by infertility – perhaps also biologically in the case of same-sex couples – to have a child. Supporters of surrogacy argue that if intending parents are prepared to go to such lengths to have a child, the child would be very much wanted and loved. In the words of the Warnock Report:

[c]hildlessness can be a source of stress even to those who have deliberately chosen it. [...] For those who long for children, the realisation that they are unable to found a family can be shattering. It can disrupt their picture of the whole of their future lives. They may feel that they will be unable to fulfil their own and other people's expectations: They may feel themselves excluded from a whole range of human activity and particularly the activities of their child-bearing contemporaries. In addition to social pressures to have children there is, for many, a powerful urge to perpetuate their genes through a new generation. This desire cannot be assuaged by adoption.⁸⁴

⁸⁴ Warnock Report, para. 2.2.

Infertility is defined as the inability to conceive after a year of unprotected intercourse.⁸⁵ While there appears to be no comprehensive global statistics on infertility, it is understood that global fertility rates are, in general, declining and this trend is most pronounced in industrialised countries, especially in Western Europe.⁸⁶ There are four known major causes of infertility: tubal disease, defects in the sperm, ovulatory failure, and endometriosis.⁸⁷ For a small but important proportion of infertile couples, the infertility is unexplained or idiopathic. Persons experiencing infertility and who are unsuccessful with medical reproductive techniques or for whom those techniques are, for various reasons, unavailable have a number of alternatives available to them. They can elect to live without children, adopt or foster a child (if eligible to do so), or pursue third-party reproduction using a sperm donor, egg donor, and/or surrogate.

With a growing awareness of infertility as well as an increasing acceptance in some states of parenting within alternative family forms (e.g. single persons and same-sex couples (usually male)), 'demand' for surrogacy services is likely to be strong. In their work on artificial conception, Singer and Wells have outlined the range of reasons which lie behind the surrogacy choice. As they see it:

There is a gradual continuum stretching from those women who physically cannot have a child without surrogacy; through those who can have a child in the normal manner but only at some risk to their lives; to those who may have more minor health grounds for avoiding pregnancy (perhaps it will aggravate their varicose veins); and to those who have serious professional considerations against becoming pregnant; and finally to those who have only those reasons against pregnancy that every woman could have, if she were inclined to give weight.⁸⁸

85 See the definition of 'infertility' given by the World Health Organisation (WHO) *available at*: <www.who.int/topics/infertility/en>.

86 See <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Fertility_statistics>. However, compare 'Infecundity, Infertility, and Childlessness in Developing Countries. Demographic and Health Surveys (DHS). Comparative reports No. 9' by ORC Macro and WHO (2004), which used data from 47 surveys in developing countries to examine women's inability to bear children and concluded that 'infertility, whether primary or secondary, has declined in most [of these] countries'; *available at*: <www.who.int/reproductivehealth/publications/infertility/DHS_9/en/index.html>.

87 See, generally, the research of the WHO *at* <www.who.int/reproductivehealth/topics/infertility/definitions/en/>.

88 P. Singer and D. Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford Paperback 1984) at 113.

For other seekers of parenthood (single people and gay couples), the surrogacy agreement may offer privacy in pursuing a wish to be a parent '*relatively free from the constraints imposed by the lowest common denominator of public opinion*'.⁸⁹

Research has shown that in particular infertile women appear to prefer a full genetic link to a partial link.⁹⁰ As a result, with the options of full or part genetic offspring available to infertile persons, adoption tends to be seen as an option of last resort or a second-best choice.⁹¹

Lastly, it should be acknowledged that surrogacy is not just a source of problems or conflicts but a source of happiness for the families it creates.⁹² Some surrogates report that they enjoy being pregnant; it is reported that some are proud of their accomplishment and glad that they could make such a difference in the lives of otherwise childless couples.⁹³ Gamble writes convincingly:

Surrogacy also benefits surrogate mothers and their families. I have known many surrogate mothers over the years, and am always struck by the self-worth they derive from having helped transform a childless couple into a family. This is not limited to surrogate mothers in the UK. Of course, in many foreign destinations there is the added dimension of payments made for the carrying of a surrogate pregnancy, but it is too simplistic to think that foreign surrogates are not altruistically or emotionally motivated as well as being driven by financial incentives. I have known a US surrogate mother who, having been paid a 'carrier fee' for her discomfort and inconvenience first time around (as is conventional practice in the state where she lives), went on to carry a second pregnancy for the same intended parents for no payment at all. I have known an Indian surrogate mother who used the payment she received from a surrogacy to re-start a family business which had been destroyed by flooding, and heard her account of how much pride she took in re-establishing her family's financial independence, while also helping someone else's family as well. The two families were glad to help each other, and have stayed in touch. What this

89 M. Ertman, 'What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification' [2003] 82 North Carolina Law Review 1-10.

90 See O. van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' [2007] Human Reproduction Update at 55.

91 See K. Rotabi and N. Bromfield, 'The Decline in Inter-country Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns' [2012] 27(2) Journal of Women and Social Work 129-141.

92 See, in particular, the comments of the courts in the UK cases reported in Chapter Three.

93 K. Busby and D. Vun, 'Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' [2009] 26 Canadian Journal of Family Law 13, 44 ('Importantly, no empirical study reviewed for this paper indicates that any surrogate mothers become involved with surrogacy because they were experiencing financial distress').

shows is that surrogacy can be a win-win collaborative human enterprise, which creates lifelong relationships which are enriching for all, including the resulting child.⁹⁴

2.3 REPRODUCTIVE TOURISM

Little is known about the motivations of reproductive 'tourists'⁹⁵ in any part of the world. Economic factors may not be the sole consideration. Researchers suggest that the causes of such travel may be manifold. Inhorn and Patrizio identify seven discrete, but often interrelated, factors promoting reproductive tourism which have been cited in the existing literature⁹⁶:

- i. Individual states may prohibit a specific service.
- ii. A specific service may be unavailable because of the lack of expertise, equipment, or donor gametes (eggs, sperm, or embryos).
- iii. Service may be unavailable because it is not considered sufficiently safe or the risks are unknown.
- iv. Certain categories of individuals may not receive a service, especially at public expense, on the basis of age, marital status, or sexual orientation.
- v. A service may not be available due to shortages and waiting lists.
- vi. A service may be cheaper in another country.
- vii. Privacy concerns may lead ART consumers to cross national and international borders.

There are therefore many potential reasons for cross-border reproductive travel including the desire to access treatments that are locally prohibited, local lack of expertise, or a shortage of potential surrogate mothers in the intending parents' country of residence.⁹⁷ Some treatments, although generally available, may be inaccessible by certain groups (such as single women or gay or lesbian couples) who travel to bypass access restrictions. Intending parents may also travel to avoid resource shortages and long waiting lists, to access treatments at cheaper prices, or to preserve their confidentiality.

The reasons why a person or a couple travel(s) will depend on the regulatory and economic conditions in their home country and will influence their choice of destination.⁹⁸ Reported reproductive travel includes, for example, '*US citizens contracting Indian surro-*

⁹⁴ *Ibid.*, 308.

⁹⁵ Reproductive travel is not always to be perceived as 'tourism'.

⁹⁶ M. Inhorn and P. Patrizio, 'ART Practice and Tourism' in J. Schenke, *Assisted Reproductive Technologies* (Cambridge University Press 2011), Chapter 22.

⁹⁷ Z. Görtin-Broadbent, 'Unpacking Cross-Border Reproductive Care' *BioNews* 584 (15 November 2010) available at: <www.bionews.org.uk/page_82441.asp>.

⁹⁸ *Ibid.*

gates, Germans travelling to Belgium for PGD (pre-implantation genetic diagnosis) and couples from the Middle East heading to Iran for sperm donation. Besides clinics, there are also several international brokerage agencies, promising to link intending parents with providers and clinics in streamlined international arrangements'.⁹⁹ Concerns about reproductive tourism are not dissimilar to those identified in the commodification and exploitation arguments set out above. Reproductive travel, however, adds the dimension of cross-cultural transactions to surrogacy arrangements. According to Pennings, 'respect for the moral autonomy of the minority demands an attitude of tolerance'.¹⁰⁰

2.4 'CYBER PROCREATION' AND SURROGACY AS A BUSINESS

The development of a market in surrogacy has attracted a great deal of interest from the media. A brief Internet search of 'surrogacy' demonstrates that surrogacy is a booming, global business. Reich and Swink refer to the very real realities of 'cyber procreation'.¹⁰¹ Figures are hard to verify but, as an example, some estimate that approximately 400 million US dollars¹⁰² a year of India's medical tourism industry (estimated to be worth approximately 2.3 billion US dollars¹⁰³ a year by 2012) is attributable to the reproductive segment of the market. Globalisation flows in multiple directions and impacts virtually all economies. But it appears to have had a disproportionate impact on developing economies.

2.5 AGENCIES, BROKERS, AND INTERMEDIARIES

Much has been written about practices in certain parts of the USA and India, where the demand has established organised surrogacy agencies and clinics as well as a market for related ancillary services (such as gamete donors and lawyers). Accordingly, this has resulted in the growth of brokers and intermediaries.¹⁰⁴ The agreement between the surrogate and

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ J. Reich and D. Swink, 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyber-procreation Era' [2011] 14 Journal of Health Care Law and Policy 241 (cyber-procreation means 'using the Internet to create human life').

¹⁰² See 'Cheaper Overseas: Surrogate Mothers, In-Vitro Fertilization is \$6,000 in India and \$60,000 in the USA' ABC News, 28 September 2007, available at: <<http://abcnews.go.com/GMA/story?id=3664065&page=1>> (six hundred IVF clinics in India bring more than \$400 million a year into the local economy); R. Ramesh, 'British Couples Desperate for Children Travel to India in Search of Surrogates: Ethics under Scrutiny as Would-be Parents are Enticed by Lower Costs and Relaxed Laws', *The Guardian* 20 March 2006, at 26, available at: <www.guardian.co.uk/world/2006/mar/20/health.topstories3> (noting that fertility market is worth about 250 million pounds per year).

¹⁰³ See <http://india.gov.in/overseas/visit_india/medical_india.php>.

¹⁰⁴ Accordingly, much of the information gathered here on surrogacy arrangements has come from the USA.

the intending couple (or person) might be arranged by a commercial or voluntary intermediary or by the parties themselves.¹⁰⁵ The parties might meet (perhaps only virtually) or they might remain unknown to each other. Their arrangement might be formal or informal. There might be payment of only medical and related travel expenses, or such payment plus a fee, or arrangements may be gratuitous. The method of conception will depend upon a number of factors including the parties' attitude to multiple births and the availability of artificial conception.

The intending parent(s) can choose from a list of potential surrogates on the basis of medical, psychiatric, educational, and professional qualities. The intending parent(s) and the potential surrogate might meet before conception occurs. To be accepted as surrogates, women must satisfy a number of criteria, which may include consideration of marriage status, employment status, medical and psychiatric history, education, and professional training.¹⁰⁶

2.6 FEES FOR AND COST OF A SURROGACY ARRANGEMENT

The financial obligations of the intending parent(s) usually involve the payment of all expenses arising from the conception and pregnancy (such as medical and hospital expenses, travel and insurance costs) and a fee to the surrogate (and, if married, her husband and perhaps also their children). The surrogate is required to bear the child (or children), to submit to directions of the selected doctor, to refrain from certain activities, and to terminate her parental rights upon birth.

The information available on the subject of costs relates to a large extent to the USA where the costs associated with surrogacy arrangements vary from case to case. One California-based surrogacy agency sets out by way of a non-conclusive list of the possible costs the following:¹⁰⁷

- Surrogacy screening fees
- Medical screening fees (surrogate)

105 The parties might be known to each other, in which case they make their own arrangements. Alternatively, the potential surrogate might have responded to an advertisement (Internet) or newspaper article reported by J. Stubbs, 'The Surrogate Mother Who Gave Birth to a Couple's Dream' *The Northern Star* 14 May 1983 at 26.

106 At a California-based surrogacy clinic, the following requirements are listed on its website: 'Once you are accepted into our surrogate mother program, the following requirements must be met prior to being presented to Intended Parents: Submit to a detailed staff interview. Psychological Clearance (evaluated by a licensed clinical psychologist). Your official medical records obtained directly from your treating physicians that are reviewed by a certified medical professional. Provide current Pap smear results. Background investigation completed (investigation includes a search of both federal and state criminal records, as well as a residential history search by name and SSN)' available at: <www.conceptualoptions.com/surrogate-application>.

107 See <www.conceptualoptions.com/cost-of-surrogacy>.

- Psychological screening fee
- Criminal history inquiry fee
- Intended parent(s) medical screening, semen analysis, and genetic screening
- Intended parent(s) parental preparation meeting with psychologist
- Surrogate compensation and other expenses
- Surrogate mother pregnancy compensation
- Surrogate monthly expense allowance
- Surrogate IVF transfer fee (embryo transfer, each attempt)
- Surrogate life insurance
- Surrogate maternity clothing allowance (depending on number of foetuses)
- Surrogate monthly counselling fee (paid over the course of pregnancy)
- Surrogate start of medications fee (each attempt)
- Surrogate insurance (depends on policy)
- Agency/related legal fees – finalisation of parental rights
- Surrogates' attorney fee
- Intended parent(s) attorney fee for drafting surrogacy agreement
- Intended parent(s) parental rights
- Filing fees for parental rights
- Surrogacy trust fee
- Medical and insurance expenses
- Medical fees and hospital/lab charges for initial fresh embryo transfer
- Medications for surrogate for initial fresh embryo transfer
- Surrogate outside monitoring fee

In addition to the fees paid to surrogates, there are also fees associated with the intermediary/agency as well as AID treatments and, in some cases, to lawyers. While no statistical data are available,¹⁰⁸ media reports relating to surrogacy agreements suggest that there:

Is no standard fee when it comes how much money a surrogate mother is paid. The costs are estimated, as each situation is different depending on the individuals involved. A first time surrogate may request a smaller fee; an experienced surrogate may charge as much as \$5,000 to \$10,000 more. Surrogates generally request an itemized compensation plan as part of their contracts [...] most first-time surrogate mothers receive compensation of between \$15,000 and \$20,000. [...] A second-time surrogate mother receives between \$23,000 and

¹⁰⁸ A table summarising the fees paid as set out in a number of leading national judgments dealing with surrogacy arrangements is set out in Chapter Three at 3.16.5. The author believes that further research is needed to understand the market dynamics.

\$28,000 on average. Additional, separate fees may be included in the contract. There will also be attorney fees to draft the agreement and court filing fees. This cost can add up to several thousands of dollars.¹⁰⁹

The current availability of surrogacy as an option of child-bearing for couples may therefore be limited to the financially able. The process of surrogacy is one that requires the privilege of time and money. And in cases of commercial surrogacy, it is difficult, as discussed above, to counter entirely the commodification argument. Mindful of the costs and payments, the question that should be in focus is whether commodification must in itself be prohibited and, if not, what, if any, are the legitimate limits.

2.7 CONCLUDING REMARKS

Advances in medical science have provided new opportunities for the creation of a family for people who previously may have not been able to conceive or have (genetic) offspring of their own. Like many new technologies, these reproductive advances are not without cost and complication.¹¹⁰

Indeed to some, the creation of a family is an appropriate end in itself. Others believe that it is wrong to conceive a child other than through sexual intercourse. Again, there are those who may regard personal autonomy and self-determination for surrogates as principal values and would reject suggestions that a surrogate should be prevented from using her body, should she choose freely to do so, to carry a child for someone else. This view, in turn, is challenged by those who regard surrogacy arrangements as degrading to both the dignity of the surrogate and child, leading to the commercialisation of reproduction. The issues in particular for surrogates include their vulnerability to exploitation, possible restrictions of personal liberty during pregnancy, medical side effects, possible lack of postnatal health care, postnatal psychological consequences, and the surrogate's relationships with their families. These anxieties are understandable; surrogacy is an intimate process. Where it concerns developing countries, it is difficult to persuasively argue that surrogacy involves neither exploitation nor commodification (at least of some sort and to some degree). Linguistic and cultural differences as well as geographical differences and disparities in wealth and literacy levels between the intending parents and the surrogate may impair understanding between the intending parents and the potential surrogate, increasing the likelihood of exploitation. While having the choice to surrogate may be part of a surrogate's autonomy, it must be accepted that not all choices that are individually

109 A. Keefer, 'How Much Are Surrogate Mothers Paid?' 25 January 2011 available at: <www.modernmom.com/article/how-much-are-surrogate-mothers-paid>.

110 R. Cook *et al.* (eds.), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003), 16.

made are truly informed and unconditional; they are influenced by context and societal, economic, and familial pressures, among others.¹¹¹ Attention must also be given to other parties who may profit from surrogacy, such as surrogacy agencies and medical and other professionals. It has therefore been shown in this chapter that there are many different views about surrogacy. While there are strong arguments in favour of prohibiting surrogacy arrangements, there are equally strong arguments in favour of accepting them in certain circumstances.

The findings indicate that surrogacy may be seen as a medical intervention, altruism, and a commercial enterprise. The discussion here makes clear that surrogacy must be understood as a global phenomenon, with national policy implications – given differing cultural, political, and national concerns relating to parenthood and MAR – and as between differing national regimes in the context of reproductive travel for surrogacy arrangements and, more broadly, fertility treatment.

Surrogacy as a means of family formation, where families cannot otherwise have a child, has been driven or enabled by a number of factors. These include:

- i. Policy changes which have led to a reduction in the availability of children via adoption. Adoption programs, which have strict criteria as to the age and family types who can adopt, for example, inter-country adoption agreements that prohibit same-sex couples or LGBTI individuals.
- ii. Women delaying child-bearing until they are older, leading to higher rates of age-based infertility.
- iii. Improved MAR techniques, which allow greater use of gestational surrogacy.
- iv. Increasing public awareness of surrogacy as a family formation option.

The comments here are of wider interest, not just for what we can learn from a consideration of the issue of surrogacy but perhaps also as a snapshot of prevailing attitudes to MAR. Dolgin has argued that as the disruptive potential of assisted reproductive technologies becomes apparent, '*traditional understandings of the family as a universe grounded in inexorable truth begin to fall apart*' and, as a consequence, '*some profoundly conservative impulse at the centre of culture asserts itself in opposition*'.¹¹² As the practice of surrogacy becomes more familiar, the attitudes which underpin the views of surrogacy, perhaps most notably the broad assumptions regarding the unquestionable evils of surrogacy and the detriment to any child born following a paid arrangement, might appear out of line with contemporary public perception.¹¹³ The appropriate way to consider surrogacy is to accept

111 J. Damelio and K. Sorensen, 'Enhancing Autonomy in Paid Surrogacy' [2008] 22 Bioethics 269, 270.

112 J. Dolgin, 'The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond' [1994] 26(4) Connecticut Law Review 1261-1313.

113 See E. Scott, 'Surrogacy and the Politics of Commodification' [2009] Journal of Law and Contemporary Problems 109-14.

both the commercial aspects (in most cases) and the intimacy of the arrangement as a normative framework for regulation.

Indeed, although both the pro- and the anti-surrogacy points of view tend to predetermine the position on the various issues within the debate, neither point of view seems grounded in empirical data; this is a recurring observation.¹¹⁴ This begs two important questions: What is public opinion? And are the arguments against surrogacy persuasive today? If opinion is to be properly attributed to the 'public', it must be acknowledged that it is subject to social change; it is not static and linked exclusively to the past, but evolves with the rest of society and culture. A public investigation which carefully identifies the problems and examines and explores all of the alternatives in responding to inter-country surrogacy would not only promote public debate, it will also increase awareness and shape the contours of public policy.

Any national or international review should consider afresh the key policy questions that should inform the regulation of surrogacy and attempt to build law and best practice that represents the best possible response to them. As Horsey and Sheldon have observed, any legislative response is likely to face difficult questions and would need to work in a way that was carefully grounded in a detailed understanding of the empirical realities of surrogacy practice, as it happens both within a jurisdiction and, importantly, across borders.¹¹⁵

114 E.g. R. Cook *et al.* (eds.), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003), 16.

115 K. Horsey and S. Sheldon, 'Still Hazy after All These Years: The Law Regulating Surrogacy' [2012] 20 Medical Law Review, 89.

3 A COMPARATIVE PERSPECTIVE

3.1 INTRODUCTORY REMARKS

The main purpose of this chapter is to explore the national legal rules for establishing legal parenthood and nationality at the time of the child's birth in cases of surrogacy. This chapter is separated into two parts.

The first part begins with an overview of the domestic approaches to surrogacy and nationality rules in the legal systems of France, Switzerland, Austria, the Netherlands, Belgium, the UK, India, and the US State of California. The research states are considered starting first with the prohibitionist states (those where surrogacy is prohibited and illegal) namely France, Switzerland, and Austria; second, the Netherlands and Belgium (states which have made no express provision in their domestic legislation on parentage and nationality; third, the UK (an example of a state with a permissive approach to surrogacy albeit surrogacy is strictly regulated and subject to meeting specific criteria); and lastly, to the most permissive, namely India and the US State of California (which serve as examples of the few states that permit commercial surrogacy agreements, i.e., which allow for payments beyond reasonable expenses).

This comparative analysis considers important questions such as who, and on what grounds, are the legal parents of a surrogate-born child. If legal parentage does not exist automatically or *ex lege*, can it be established and, if so, on what basis? If not, on what basis are the courts and/or national authorities refusing to establish or recognise parentage in favour of the intending parents (public policy or *fraude à la loi*)? The focus then shifts from the national case to the international case: How do the national legal systems involved deal with problems of parentage in surrogacy cases with a foreign element, i.e., what if the surrogate involved has a nationality, domicile, or residence different to the intending parents?

A comparative assessment of nationality law is presented in order to identify any normative gaps in the establishment of a nationality for the surrogate-born child in the home state of the intending parents. An analysis of the relevant law (or practice) in terms of birth records and birth registration following surrogacy arrangements is also presented. Given the absence of empirical data, the review is interested in the factors the courts and national authorities are considering in coming to their decisions and how and why they framed their decisions in the way that they did. In addition, particular focus with respect to the review is to identify to what extent are the legal systems considering children's rights issues, including rights to an identity, accurate birth registration, continuation in relationship

rights, and nationality, as well as child protection matters as part of their consideration of inter-country surrogacy cases.

Depending on the states involved and the exact factual matrix, legal problems in the determination of parenthood and/or nationality may arise¹: (a) when the intending parents wish to take the child from the state of birth of the child to their state of residence, (b) once the child is in the state of residence of the intending parents and either registration of the foreign birth certificate is sought or a judicial/administrative action is brought to recognise a foreign authentic act or judgment relating to the child's legal parentage,² and (c) at some later date when the issue of parentage might be raised as an incidental question to a determination of nationality or a residence or maintenance dispute in the state of residence of the intending parents or a third state.³

An insight into the differences and similarities of the national rules and approaches with respect to the establishment of legal parentage and the nationality of the surrogate-born child is therefore presented. In doing so, the analysis provides practical examples from the research jurisdictions of the issues that can arise in inter-country surrogacy and how these issues are understood and resolved. This approach also provides an opportunity to identify the assessment and understanding of the public policy issues identified in Chapter Two, principally, the human dignity and best interests of the child, the human dignity of the surrogate and the inalienability of the human body in that the human body cannot be an object of commerce, the interest of the child to know his or her origins and the child's right to a nationality.

It should be noted at the outset that certain reviews (e.g., the UK, France, the Netherlands, and Belgium) are necessarily more exhaustive than others (e.g., Switzerland and Austria) due to the more considerable research material and reported case law available. Moreover, with California and India among the surrogacy 'hotspots' (destinations for surrogacy), the focus of these reviews is on the law and practice as they relate principally to non-Californian or non-Indian resident intending parents as well as the regulatory frameworks that have been adopted in California and India.

The second part of this chapter critically analyses the findings from the reviews in order to identify any emerging trends, common approaches among the research jurisdictions and the principal legal problem areas. The aim is to evaluate the normative gaps and to find any common ground.

1 This list is not even exhaustive. Multiple births may be attempted in the context of surrogacy, thereby increasing the number of potential players involved in the conception arrangement.

2 *Ibid.*, 11.

3 See also the comments of the Permanent Bureau, HCCH Prel. Doc. No 11 of March 2011, para. 13.

3.2 ESTABLISHMENT OF LEGAL PARENTAGE

Knowledge of the law of parentage in different legal systems is important because the objective of the law on parentage is to determine who are the child's legal parents and the confirmation of legal parenthood, as discussed in Chapter One, is relevant for assigning responsibilities with respect to a particular child and very often relevant for the purposes of the law of nationality.

3.2.1 *The question of applicable law*

Before turning to an examination of the domestic approaches to surrogacy across the research jurisdictions, a brief overview of the methods to establish legal parentage with respect to a child born abroad and issues that are determined by the law applicable (or the *lex causae*) to parentage will be presented.⁴ It is necessary to have an insight into the different methods to establish legal parentage because these rules are the object of private international law (PIL) on parentage: the conflict of law rule(s)⁵ that determines the law(s) that applies to a person's parentage determines whether the parentage has to be established (or contested) in accordance with the rules of the state of birth of the child or the home state of the intending parents.

Intending parents attempting to have a child through surrogacy may not consider applicable law at all, believing instead that satisfaction of the requirements of the law of the state of the child's birth is and will always be determinative. It is important to accept that the potential conflict between different laws (the law of the birth-state and the home state of the intending parents) may cause a number of legal and practical difficulties for the child and for the intending parents.

The first question to ask is whether it is possible to establish legal parenthood in the context of surrogacy. Legal parentage might be established *ex lege* as a result of a certain fact such as giving birth, genetic paternity, or marriage to the mother or a collection of facts such as apparent status. *Ex lege* existence of parenthood means that legal parenthood exists automatically without any juridical action being required. For example, giving birth is the basis for legal maternity in each of the legal systems under consideration and most legal systems provide that the birth mother is the legal mother by dint of birth. In this case, legal maternity exists *ex lege*. The general rule that the husband is the legal father of the

4 For a comparative review of the law of parentage, see K. Saarloos, 'European Private International Law on Legal Parentage? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition In Legal Parentage' (Dissertation, Maastricht University, 2010), 134. See also C. Forder and K. Saarloos, 'The Establishment of Parenthood: A Story of Successful Convergence?' Maastricht Faculty of Law Working Paper No. 2007-01.

5 Note that there may be a differentiation of applicable laws within the same cause of action.

child is based on the Latin maxim *pater vero is est quem nuptiae demonstrant*.⁶ However, the automatic establishment of the legal paternity of the mother's husband or the legal maternity of the birth mother does not necessarily reflect the genetic truth. Legal parentage can also be established by means of a juridical act such as the acknowledgement of paternity or, in a more limited number of states, maternity. Finally, legal parentage can also be established by a judgment such as in the case of adoption.

In an inter-country surrogacy situation, national registrars or courts that have to determine the legal parentage of a child first have to characterise⁷ the legal issue to select the applicable law (*lex causae*) to the child's legal parentage. The applicable law is selected on the basis of national conflict rules.⁸ The *lex causae* determines who are the legal parents of a child. Thus, the *lex causae* determines, for example, whether the husband of the mother is the child's legal father, whether it is the husband at the moment of birth or at the moment of the conception of the child. If legal parenthood is not established by operation of law, the *lex causae* determines whether it can be established by some other ground, such as acknowledgement. If legal parenthood does not exist *ex lege* and if it has not been established by acknowledgement of parenthood, the *lex causae* on legal parentage determines whether it can be established by a judicial decision. In certain jurisdictions the judicial establishment of legal parentage is not allowed if the legal parentage of the child has already been established automatically by operation of law or voluntarily by registration or acknowledgement of parenthood. There are, however, exceptions to this general rule.⁹

The acknowledgement of parenthood involves questions of substance that are governed by the law applicable to parentage. The acknowledgement of parenthood also involves questions concerning formal validity: Does the acknowledgement of parenthood have to be laid down in an authentic or public document or is a private document sufficient? The *lex causae* on legal parentage also determines whether or not the legal parenthood can be

6 Although the general rule is that the husband of the mother is the legal father of the child *ex lege*, the precise formulation of the rule differs across jurisdictions. The main issue is whether it is the husband at the moment of conception or at the moment of birth who is the legal father of the child.

7 Characterisation is a process which is present in the application of any legal rule. Fitting a factual situation into the appropriate rule of law requires its dressing with the appropriate legal garment, thus giving it its legal character. In conflict of laws, the applicable law depends on the characterisation of the issue. The latter is more complicated than characterisation in domestic cases and thus more difficult. In cases without foreign elements, domestic law characterises the issue, while in conflicts cases, more laws are involved and, consequently, it has to be decided which one of them will be used for the characterisation. See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell 2012).

8 Issues that are not decided by the law applicable to parentage may be governed by the *lex fori* if they are characterised as procedural issues or they may fall within the scope of another conflict rule such as the conflict rule for the validity of juridical acts or the conflict rule for legal capacity of natural persons. The question of how to construe the terms used in the conflict rule is a separate issue. See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell 2012).

9 E.g., in Belgium, a procedure can be instituted but the husband of the mother or the co-parent who acknowledged the child must participate in the proceedings.

contested.¹⁰ With regard to the possibility to establish (or contest) legal parenthood, Saarloos notes that the *lex causae* determines the *locus standi*, the periods of limitation and the facts that have to be proven.¹¹

These comments suggest that for surrogate-born children, legal parentage might therefore be established *ex lege*, by juridical act such as the acknowledgement of paternity or maternity, or by a judgment.

Following the birth of a child in a surrogacy-friendly jurisdiction, the child is usually transferred immediately at birth into the physical care of the intending parents. Returning to the introductory comments in Chapter One, given the absence in most states of statutory rules on parentage (and, as a result, the absence of specific conflict rules on parentage) and nationality in the context of inter-country surrogacy, it should be anticipated that the determination of parentage in the home state of the intending parents is therefore more likely to arise in the context of the recognition of a foreign judicial judgment on parentage or a foreign authentic act (e.g., a birth certificate). Gruenbaum writes:

[O]ne may reasonably expect that foreign surrogate motherhood arises more frequently in the context of the recognition of a foreign judgment than in the application of foreign law. This is due to the fact that, in the great majority of legal systems which allow any form of surrogacy, the intended woman (or couple) will have had her (or their) status as the child's legal mother (or legal parents) not automatically conferred by law, but rather by means of a judicial judgment.¹²

PIL rules concerning parenthood¹³ will only come into play in those cases where the intending father and/or the intending mother has been declared the child's legal father and mother automatically by law at birth (as may occur under the laws *inter alia* of California, Greece, Illinois,¹⁴ Nevada,¹⁵ and Ukraine¹⁶). This means that, in practice, a key question more likely to arise in the context of inter-country surrogacy is whether legal

10 The annulment of legal parenthood is not considered in this thesis.

11 Saarloos, note 4, 53.

12 D. Gruenbaum, 'Foreign Surrogate Motherhood: Mater semper certa erat' [2011] American Journal of Comparative Law 13.

13 E.g., Article 311-14 Code Civil (France); Article 19 Einführungsgesetz Zum Bürgerlichen Gesetzbuch (Germany); Article 33 Legge 31 maggio 1995 (Italy); Article 68 Loi fédérale du 18 décembre 1987 sur le droit international privé RS 291 (Switzerland); Section 103 Uniform Parentage Act (2000) (as amended) (USA).

14 750 Ill. Comp. Stat. Ann. 47/15(B)(1).

15 Nev. Rev. Stat. Ann. § 126.045 (2).

16 Article 123(2) Family Code of Ukraine.

parentage of the intending parents lawfully established in one state is capable of recognition¹⁷ in another.

3.2.2 *The question of recognition of foreign judgments concerning parentage*

A foreign judgment (or decision) usually has no direct operation in a state. It cannot, thus, be immediately enforced by execution. This follows from the position that the operation of legal systems is, in general, territorially limited. Nevertheless, a foreign judgment may be recognised or enforced in other states. At this stage of the discussion, it should be noted that with respect to the recognition of legal parentage established abroad, unless the recognition of foreign judgments on legal parentage is regulated by a bilateral or multi-lateral treaty, each state will need to determine how recognition can be considered. There are principally two methods used to solve international cases on parentage: the ‘choice of law’ method and the ‘recognition’ method.¹⁸

In the case of the choice of law method, the existence of legal relations is determined by the forum on the basis of the applicable law. The applicable law is, in general terms, determined by the conflict rule which is based on the presumption that the connecting factor indicates a close connection between the case and the applicable law.

In the case of the recognition method, the forum does not determine whether or not the legal relationship exists but determines whether or not the relationship can be recognised. The problem with the recognition method is how to determine the existence of a legal relationship.

3.2.3 *The question of recognition of foreign authentic acts concerning parentage*

In most cases when intending parents return to their home state with the surrogate-born child, the couple may be in the possession of a birth certificate with both their names listed as the child’s parents (an original birth certificate or amended following a judgment of parentage), or they may return with a birth certificate that lists the surrogate and the

17 That the meaning of ‘recognition’ in this context, and whether the term is appropriate at all, will often depend upon the view taken by a state of the nature of parentage and birth certificates. Moreover, in some states, different rules may apply depending upon the use which it is sought to make of a foreign birth certificate: for example, one rule may apply if the document is relied upon as evidence of the findings of fact of the foreign authority, and a different (more invasive) procedure may be required if ‘full recognition’ of the document – i.e., recognition of the legal relationship established or evidenced therein – is sought.

18 See HCCH Prel. Doc. No 10 of March 2012 (for the attention of the Council of April 2012 on General Affairs and Policy of the Conference) at 20-23.

intending father on the birth certificate (an original birth certificate), or they may return with an adoption order in one or both of their names (judicial adoption order).

Instruments of civil status (especially those on parentage) do not typically contain enforceable decisions; their primary purpose is to prove facts, such as the birth of a person or the acknowledgement of parenthood. The description of a person's legal parentage in a birth certificate is usually only a provisional conclusion on the status of the person involved according to the law when recording the birth.

The applicable PIL rules on recognition can and often will be very different and are also likely to fall subject to a public policy exception.

3.2.4 *The acceptability of foreign law*

PIL rules leave room for judicial solutions that are usually alien to the forum. Such flexibility is necessary in order to regulate cross-border matters efficiently. However, this flexibility finds its limits in the public policy exception.

The extent to which differences in foreign law are accepted by another forum is determined by the public policy (or *ordre public*¹⁹) of the state. Public policy is a multi-faceted concept, and the doctrine of public policy is applied in multiple ways. Rian de Jong comments that public policy 'refers to maintenance of the values and interests that are considered essential in a certain society or legal system.'²⁰ Van der Schyff refers to the work of Kiss to argue that *ordre public*:

[I]s a concept that is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances. In both civil and common law systems it requires someone of independence and authority to apply it by evaluating the different interests in each case.²¹

Public policy relates to the fundamental values, principles, and constitutional rights of a state. There is a very wide sense in which public policy would be synonymous with general or common welfare. The sources of public policy can include a national constitution, special legislative acts or doctrine. The multiplicity of the sources can best be understood by way of an example. Article 2 of the Belgian Code of Private International Law reads:

19 In PIL, the notion of public policy is broadly equivalent to *ordre public*. In this thesis, it is used interchangeably.

20 M. de Jong, *Orde in beweging* (Deventer Kluwer 2000), 204.

21 G. van der Schyff, *Limitation of Rights* (Nijmegen Wolf Legal Publishers 2005) 149-150, referring to A. Kiss, 'Permissible Limitations on Rights,' in L. Henkin (ed.), *The International Bill of Rights* (New York Columbia University Press 1981) 290.

The present statute regulates in an international situation the jurisdiction of Belgian courts, the designation of the applicable law and the conditions for the effect in Belgium of foreign judgments and authentic instruments in civil and commercial matters without prejudice to the application of international treaties, the laws of the European Union or provisions of special statutes.²²

Public policy is increasingly viewed as a negative concept, i.e., it is only used as a defence mechanism against foreign law or the recognition of foreign judgments. The positive role of public policy (positive public policy) aimed at the enforcement of mandatory law finds less prominence. These mandatory rules have different sources. They are either created unilaterally to protect the fundamental values of society²³ or are created at the regional level or even at an international/multilateral level. If created within the international legal order, they may qualify as *jus cogens* rules.²⁴

Public policy plays a role if, according to conflict rules, foreign law has to be applied and the result of the applicable (foreign) legal provision would be irreconcilable with the domestic legal order or to block the recognition of a foreign judgment in order to avoid an unacceptable derogation from values that the court sees as fundamental to its own legal systems.²⁵ When a court determines that a foreign law rule is incompatible with public policy of the forum, the question arises on what other law should be applied. The designated foreign law is only left aside to the extent that it is incompatible with public policy. However, no general rule is given in the event that the public policy exception does apply. The decision is left to the courts. One possibility is to resort to the application of the *lex fori*.

Public policy therefore serves as a tolerance limit with regard to unacceptable outcomes of the application of foreign law and to unacceptable foreign judgments. It is a barrier raised as the last resort to protect fundamental principles of the forum from the intolerable effects of foreign norms or judgments.²⁶ There is, however, no bright line dividing what

22 Law of 16 July 2004 holding the Code of Private International Law; English translation available at: <www.ipr.be/data/B.WbIPR%5BEN%5D.pdf>.

23 The values can be cultural, human, sociological, economic, or political. See the codified private international law rules in Belgium, the Netherlands, France, Austria, and Switzerland. By way of an example, Article 20 of the Belgian Code for Private International Law reads: 'Mandatory rules – The provisions of the present statute do not prejudice the application of the Belgian mandatory or public policy provisions, which, by virtue of the law or their particular purpose, are aimed to govern the international situation irrespective'.

24 For a description of *jus cogens* rules and human rights, see A. Bianchi, 'Human Rights and the Magic of Jus Cogens' [2008] 19(3) European Journal of International Law.

25 J. Blom, 'Public Policy in Private International Law and Its Evolution in Time' [2003] 50(3) Netherlands International Law Review 373-399.

26 In some very particular instances, the barrier of public policy may be raised to protect fundamental principles not of the forum, but those of a foreign legal system (foreign public policy), of a supranational source (e.g., European public policy), or of transnational importance (international or transnational public policy). Yet, the conditions and extent in which the public policy protection should be afforded to recognised fundamental principles, other than those in the forum, remain largely unsettled.

constitutes a tenet of the law of the forum and what is simply the result of an erroneous assessment of ‘local values [...] into public policy on the transnational level.’²⁷ It is difficult to define the limits of a general legal concept as broad as public policy, and it is, therefore, not surprising that problems have arisen across all legal fields, including family law and children’s rights.

The function of the public policy exception is not to control foreign law or a foreign judgment in the abstract²⁸ but to bar the effects and particular result that its application or recognition may produce in the forum in a concrete case.²⁹ This necessary rejection is known as a standard element in PIL treaties.³⁰ Insofar as the public policy exception is applicable, it is also generally accepted that its application is restricted to exceptional cases. This is mainly due to the exceptional character of these clauses, which only apply in extreme cases and require a ‘manifest’ contradiction to fundamental values.³¹

This leads to the initial conclusion that public policy cannot therefore be determined in the abstract but *in concreto*. It is generally accepted that each case has to be decided on its own facts and the application of the foreign law or the recognition of the judgment must create intolerable results in practice. A result-orientated examination of the individual case is required.

National public policy clauses in respect of the recognition of foreign judgments also concern violations of basic values (often of a human rights nature) and always require a result-oriented examination of the individual case. For example, Swiss law has an express public policy provision, which sets out the prerequisites for the recognition of foreign judgments. The recognition of a foreign judgment is excluded where the recognition of the judgment would produce a result which would be manifestly irreconcilable with fundamental principles of Swiss law, especially where the recognition is irreconcilable with basic constitutional rights. Similar public policy provisions are laid down in other national regulations (e.g., Article 64(g) Italian Statute on Private International Law 1995).

At the European level, public policy is increasingly no longer only understood as an instrument for the protection of individual states values. On the contrary, the content of public policy has become increasingly European.³² While it is not possible to define European public policy with any precision, all accounts of the concept would make reference

27 *Kuwait Airways Corporation v. Iraqi Airways Company and Others* [2002] UKHL 19 at [114] (‘Local values ought not lightly to be elevated into public policy on the transnational level’).

28 P. Mayer, ‘Le Phénomène De La Coordination des Ordres Juridiques Étatiques en Droit Privé’ [2007] 327 *Recueil Des Cours* 11 312; P. Nygh, ‘Foreign Status, Public Policy and Discretion’ [1964] 13 *International and Comparative Law Quarterly* 39–50.

29 *Ibid.*, 217.

30 A public policy clause is a standard element of the Hague Conventions and certain EU PIL instruments discussed in Chapter Four.

31 See, e.g., Articles 15 and 27 of the Swiss Federal Code on Private International Law 1987.

32 This is discussed further in Chapter Four.

to the European Convention on Human Rights and, in the context of the EU,³³ the EU Charter on Fundamental Freedoms.³⁴

To this extent, it is possible to talk of a common EU public policy, in which the common constitutional traditions of the Member States and the general principles of law following from international treaties are also taken into account. With regard to the content of the exception for the purposes of EU law, the Court of Justice of the European Union underlines the difference between the content of the public policy exception as determined by national law and the limits of its application as controlled by the Court. In the context of recognition policies, before the national court may find recognition contrary to public policy, the court addressed must usually consider whether that recognition would conflict, to an unacceptable degree, with the legal order in the state of recognition because it would infringe a fundamental principle or would involve a manifest breach of a rule of law, which is regarded as fundamental within that legal order. When an aspect of free movement across the EU is at stake, which is a fundamental principle, it is plain that a mere difference between the substantive law (or the PIL rules) of the original court and that of the court of recognition is not sufficient to justify non-recognition.³⁵

Another mechanism to protect the national order in some legal systems has traditionally been the mechanism of fraud on the law or *fraude à la loi*.³⁶ Evasion of the law in relation to parentage means that one uses the rules on legal parentage for a purpose that is prohibited by law. Or, to put it another way, if it is not acceptable to do something in one country, why is it acceptable to do in other countries? For example, a public prosecutor may have standing to apply for annulment of acknowledgement of legal paternity if the acknowledge-

33 Some recent European regulations follow the principle of mutual recognition with no reference to public policy. Accordingly, the regulations on the European Enforcement Order of 2004 and on the European Order for Payment of 2006 do not contain any public policy clauses. Here, the expressly stated abolition of exequatur or, alternatively, 'intermediate proceedings' has restricted the examination of foreign decisions; domestic and foreign judgments are on the same footing. A public policy review is thus no longer possible; the only remedies for the debtor are now those in the context of the execution proceedings themselves. An abolition of exequatur can also be found in the Maintenance Regulation for judgments rendered in Member States which are bound by the Hague Protocol of 2007 (Article 17(1) Regulation 4/2009).

34 Case C-295/04 *Manfredi* [2006] ECR, I-6619. The approach in the *Manfredi* case is not foreign to European human rights law. In its case law, the ECtHR has on some occasions referred to the ECHR as a constitutional instrument of European public policy. This expression was used for the first time in the *Loizidou* case (*Loizidou v. Turkey (Preliminary Objections)*) ECHR (1995) Series A. No. 310, para. 75), thereafter in the important *Bosphorus* case (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (GC) ECHR (2005) Appl. No. 45036/98). In *Loizidou*, the Court found the following on limitations as regards obligations of the ECHR: 'Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public).'

35 See the discussion in Chapter Four at 4.14.4.

36 M. Niboyet and G. de Geouffre de La Pradelle, *Droit International Privé* (Paris LGDJ 2007) para. 323; W. Tetley, 'Evasion, Fraude à la Loi and Avoidance of the Law' [1994] 39(2) McGill Law Journal 303-332. The concept of fraud in French PIL is broadly unknown to Anglo-Saxon private international law.

ment violates, for example, the national law on adoption. Or, in the case of surrogacy, the establishment of the legal maternity of the intending mother rather than the birth mother constitutes a *fraude à la loi* in France because Articles 16-7 and 16-9 French Civil Code provide that surrogacy violates French public policy.

It is mainly at the moment of recognition of a foreign birth certificate or a foreign judgment on parentage that the question arises as to whether legal parentage violates mandatory rules and/or the public policy of the recognising state. As many legal systems oppose surrogacy, some courts will either resort to their own mandatory rules prohibiting the practice, if such rules exist (e.g., by reference to a national constitution or legal act), or find it contrary to public policy. National law is likely to provide that recognition of a foreign judgment or authentic act on civil status in relation to parentage be subject to a public policy exception: that the foreign judgment manifestly violates public policy (substantive and/or procedural law); if the foreign court did not have jurisdiction; the foreign court did not base its decision on a proper procedure; or that the choice for the foreign court is not fraudulent. Other possible requirements of a procedural nature may include the need for legalisation and translation.³⁷

A principal question that is likely to emerge in each of the research jurisdictions is whether the application of a state's public policy or fraud on the law exception (or any other mechanism) *must* lead to the non-establishment or the non-recognition of a parent-child relationship between the intending parents and the surrogate-born child. Understanding this question requires an assessment of the meaning of public policy in the context of (inter-country) surrogacy.

The public policy implications of a surrogacy arrangement are identifiable and, as considered in Chapter Two, include (i) the inalienability of the human body in that the human body cannot be an object of commerce; (ii) the inalienability of personal status (e.g., parentage) by private agreement; (iii) public policy against the commodification of children and the unlawful placement of children; (iv) public policy against the exploitation of women; (v) the protection of the family life of the mother and her child (including the non-relinquishment of a child against a mother's wishes); (vi) the social family life of the established legal family; (vii) the interest of the child to know his or her origins and that

37 Bilateral or multilateral agreements exist concerning these matters, e.g., see the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, as well as the work of CIEC/ICCS (<www.ciec1.org>). In addition, within the EU, the European Commission has proposed a regulation which would aim to abolish legalisation and apostillisation between EU Member States for certain categories of public documents: see further 'Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012' (COM(2013) 228 /2). The proposed new rules would not, however, have any impact on the recognition of the content or the effects of the documents concerned (see Article 2 of the Proposal). See also the 2010 Green Paper, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records', COM(2010) 747 final.

child's identity rights; (viii) public policy against the infringement of the law of adoption, including terms of consent, termination of parental rights and the payment of funds; and (ix) statutes and case law governing legal custody and physical placement focusing on the best interests of the child. Yet even with this non-exhaustive list, public policy does not correspond to a particular group of legal static norms, which can be defined in advance and must always be applied to any case with a foreign element, but rather to certain fundamental principles of the forum which vary along time and space. This has a consequence in PIL: a court, confronted with a public policy exception, must apply public policy as defined at the time it has to make a decision and not at the time the facts occurred.³⁸ This is the so-called temporal relativity of public policy (*relativité de l'ordre public* or *zeitliche Relativität*).³⁹

Applying this discussion to the topic of surrogacy, although a court may hold that surrogacy is contrary to a fundamental principle of the forum, it may allow nonetheless some of its effects to be produced. A state's (via its judicial or national authorities) analysis of what offends public policy in the context of surrogacy appears to depend on the intensity of the relation between the case and the forum, in that the tolerance towards the particular result produced by the foreign norm or judgment should be inversely proportional to the proximity of the case with the forum. Although there is no scale, the stronger the connections, the stricter the control, whereas the weaker the connections (especially in incidental or preliminary questions), the more tolerant one should be. Nussbaum, in speaking of the public policy doctrine, remarks: '[A]ll depends on the circumstances, or, more precisely, on the importance of the 'contacts' of the case with the territory of the forum.'⁴⁰ This point is particularly emphasised in German law (*Inlandsbeziehung*), as well as in Swiss, French (*ordre public de proximité*)⁴¹ and Belgian law.⁴² The public policy requirements may therefore vary. The closer the links of the case with the forum – in time or distance – the more severe the requirements may be. But, as considered below, some values are such as

38 A. Mills, 'The Dimensions of Public Policy in Private International Law' [2008] 4 Journal of Private International Law 201- 236. According to Mills, '[p]ublic policy is both a ubiquitous and fundamentally important part of private international law, defining the limits of the tolerance of difference implicit in rules on choice of law and the recognition and enforcement of foreign judgments. It has, however, been frequently criticised for its uncertainty and discretionary character.'

39 See, e.g., L. Gannage, 'L'ordre Public International À L'épreuve Du Relativisme Des Valeurs' [2009] Travaux du Comité Français de Droit International Privé: Années 2006-2008, at 205.

40 A. Nussbaum, 'Public Policy and the Political Crisis in the Conflict of Laws' [1940] 49 Yale Journal of Law 1027-1031.

41 As noted by D. Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' [2011] American Journal of Comparative Law 499.

42 Loi du 16 juillet 2004 *Code de droit international privé*, *Moniteur Belge* 27 July 2004, 57344, Article 21 al. 2 (establishing that the incompatibility of a foreign norm and the public policy of the forum should 'take into account, notably, the intensity of the relationship between the situation and the Belgian legal system and the severity of the effect that would be produced by the application of that foreign law').

to justify public policy to be invoked even in cases that present only modest links with the forum.

PART ONE

Discussion now turns to the treatment of inter-country surrogacy in each of the research jurisdictions.

JURISDICTIONS WHICH ARE ANTI-SURROGACY

3.3 FRANCE

3.3.1 Overview of domestic approach⁴³

Surrogate motherhood is prohibited in France and has been since 1991.⁴⁴ This prohibition was confirmed in the law of bioethics of 1994⁴⁵ and is codified in Article 16-7 of the *Code Civil* ('French Civil Code') whose provisions, described as public policy by Article 16-9 French Civil Code, provide that '*any reproductive or gestational surrogacy agreement shall be void*', with absolute nullity.⁴⁶ Article 16-7 French Civil Code ratifies the position adopted by the Plenary Meeting of the Court of Cassation in its judgment of 31 May 1991: '*the agreement by which a woman undertakes, even if free of charge, to conceive and carry a*

43 The author is grateful to and acknowledges his discussions with Me Charlotte Butruille-Cardew of CCBC Avocats. Particular attention given in this part of the research is given to the presentation on the approach to surrogacy in France given by Nicolas Sauvage at the Aberdeen Workshop, N. Sauvage, 'National Report on France', in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 7. Reference in this part of the research is also made to the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by France (available at: <www.hcch.net>); the work of F. Monéger in '*Gestation pour autrui: Surrogate Motherhood*' (Paris: Société de législation comparée, Collection colloques, Volume 14, 2011) and G. Ruffieux, 'Retour sur une question controversée: le sort des enfants nés d'une mère porteuse à l'étranger' [2014] RDLF; the CIEC Report on Surrogacy.

44 Decision of the *Cour de Cassation* (Cass. Ass. plén., 31/05/1991).

45 The reference to bioethics as opposed to human reproduction techniques arguably reflects a focus on the protection of fundamental principles of bioethics rather than on human reproductive techniques.

46 Articles 16-7 and 16-9 French Civil Code. Articles 16-7 and 16-9 have not been amended during successive revisions of the laws of bioethics implemented by law no. 2004-800 of 6 August 2004 and then by law no. 2011-814 of 7 July 2011. There are signs that the attitude towards surrogacy in France is changing: Sénat 2007-2008, 'Rapport d'information sur la maternité pour autrui' (28 June 2008), N° 421 Sénat Session Ordinaire De 2007-2008 ('French Senate Report').

*child to abandon it on delivery contravenes both the public policy principle of the inalienability of the human body and that of the inalienability of personal status.*⁴⁷

The French prohibition of surrogacy is justified by moral and ethical concerns, such as the prevention of the commodification of children, the protection of the best interests of children and the prevention of the exploitation of surrogate mothers who must relinquish parental rights to the child after giving birth. To quote the French Senate in its report on the topic:

La gestation et la procréation pour autrui sont strictement prohibées en France, et passibles de sanctions civiles et pénales, au nom des principes de l'indisponibilité du corps humain et de l'état des personnes, de la volonté d'empêcher l'exploitation des femmes démunies, et de l'incertitude qui pèse sur leurs conséquences sanitaires et psychologiques pour l'enfant à naître et la femme qui l'a porté.⁴⁸

Any surrogacy agreement – full or partial, commercial or altruistic – is prohibited under French law and is contrary to French public policy (*ordre public*). In France, prohibitions of *ordre public* are mandatory rules to protect fundamental values of society and from which parties cannot derogate. Neither the human body nor the civil status of a person may be subject to private agreement.⁴⁹ As a result, surrogacy arrangements are prohibited by the *Code penal* ('French Criminal Code').

With regard to criminal proceedings, the inducement to abandon a child and the substitution of a child constitute criminal offences which are punishable by three years' imprisonment and a fine of up to Euro 45,000.⁵⁰ Those who may be regarded as co-authors of the offence are the surrogate when she has concealed her parental relationship with the child; the intending mother; and, if she is married, her spouse if he has made a false declaration of filiation to the office of the registrar of births. In addition, acts committed by intermediaries for the purpose of facilitating surrogacy constitute offences punishable by either six months' imprisonment and a fine of Euro 7,500, one year's imprisonment and a fine of Euro 15,000, or two years' imprisonment and a fine of Euro 30,000, depending on the case. Agencies or clinics may be sanctioned with fines up to Euro 450,000.⁵¹ The

47 Judgment of Plenary Meeting of the Court of Cassation 31 May 1991, Bull. civ. no. 4) (MWG translation).

48 French Senate Report. See also N° 736 Session Extraordinaire DE 2011-2012 Enregistré à la Présidence du Sénat le 31 juillet 2012 available at: <www.senat.fr/leg/ppl11-736.html>.

49 Generally, Article 323 French Civil Code provides that 'actions relating to parentage cannot be subject to waiver.' This article provides for the principle of 'unavailability of the state', which dictates that a woman cannot conventionally undertake to abandon the child she carries and that she cannot conventionally renounce being a mother.

50 Article 227-13 French Criminal Code.

51 *Ibid.*

French Criminal Code also prohibits any medically assisted reproduction technique not permitted by the Public Health Code, punishable up to five years' imprisonment and a fine up to Euro 75,000.⁵²

As a warning, the French Embassy in the Ukraine issued the following statement on 11 April 2013:

Le Ministère des Affaires Étrangères met en garde les ressortissants français contre le recours, en Ukraine, à une mère porteuse. Il rappelle que, si la législation ukrainienne autorise la gestation pour autrui, la loi française interdit tout contrat de mère porteuse (art.16-7 du code civil) et prévoit des sanctions pénales en cas de simulation ou dissimulation ayant entraîné une atteinte à l'état civil d'un enfant, ou de provocation à l'abandon d'enfant (art. 227-12 et 227-13 du code pénal).

Contrairement aux informations fournies par certains instituts locaux de médecine reproductive, les ressortissants français qui recourraient malgré tout à la gestation pour autrui risqueraient de rencontrer de graves problèmes juridiques et administratifs en matière de transcription de l'acte de naissance ukrainien de l'enfant et de délivrance d'un titre de voyage pour ramener celui-ci en France.

En outre, en application de la loi ukrainienne, les Français qui tenteraient de faire passer illégalement la frontière ukrainienne à l'enfant s'exposeraient à des poursuites pénales en Ukraine pouvant entraîner le prononcé de peines d'emprisonnement.

In the context of inter-country surrogacy, the limited territorial effect of these sanctions is of interest, which perhaps explains why there have been no reported sanctions in France despite the national prohibition. The Court of Créteil has held that:

French criminal law is not applicable [with respect to administrative procedures taken place by an intended couple at the Consulate of France in a foreign country]; article 113-2 of the penal code prescribes that the offence is considered as committed on the territory of the republic when one of the constitutive facts of it took place on the territory; as all the constitutive facts of what could be qualified simulation, as defined by article 227-13 of the penal code, took place on the territory of the United States, in conformity to the legislation in force in that country. [...] The attempt to transcribe birth certificates at the Consulate General of France in Los Angeles cannot be considered as taking place on the

⁵² Article 511-24 French Criminal Code.

French territory to the extent, in international law, the premises of the consulate do not enjoy of extraterritoriality and are a part of the receiving State.⁵³

Despite Consular warnings, it is understood – albeit informally – that 150 to 200 children are born via surrogacy to French citizens each year⁵⁴ and there appears to be a growing number of cases before the French courts in order to establish the parenthood of one or both of the intending parents. Central to the applications are PIL issues relating to the recognition of foreign birth certificates and judgments and the meaning of public policy. A selection of the case law is considered below.

3.3.2 *Legal parenthood in the context of surrogacy*

With no specific law on parentage in the context of surrogacy, reference must be given to the domestic rules on parentage in order to determine the legal parents of a surrogate-born child. Article 310-1 French Civil Code provides that legal affiliation is established by registration, acknowledgement, apparent status, or judicial establishment.

(a) **The grounds for legal maternity**

The French Civil Code does not state explicitly who is the legal mother of a child; instead, it provides how legal maternity can be established and annulled. Nevertheless, it is apparent from the French Civil Code that the legislative aim is to establish legal motherhood in favour of the woman who gives birth to the child. For example, Article 332 French Civil Code provides that legal maternity can be annulled if it is proven that the legal mother did not give birth to the child. However, unlike the other legal systems considered in this thesis, under French law, the legal maternity of the birth mother is not established automatically (i.e., by dint of birth). Further actions are needed such as the registration of the mother's name on the child's birth certificate, acknowledgement of the child by the mother or, as considered below, by apparent status.⁵⁵

Even if the maternal affiliation is not established with respect to the surrogate because she has given birth anonymously (Article 326 French Civil Code⁵⁶) or because she is not identified in the birth certificate (Article 57 French Civil Code) or because she has given birth in a jurisdiction in which she is not treated as the legal mother on birth, French law

⁵³ Court of First Instance of Créteil, ordinance 30 September 2004.

⁵⁴ Nicholas Sauvage at the Aberdeen Workshop.

⁵⁵ Articles 311-25, 316 French Civil Code. I. Schwenzer (ed.) *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Intersentia: 2007), 3-4; see also K. Saarloos, 'European Private International Law on Legal Parentage? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition in Legal Parentage' (Dissertation, Maastricht University 2010), 14-16 and 41-44.

⁵⁶ Discussed at 3.3.2(d).

and practice prohibit all means for the intending mother from acquiring the status of legal mother.

At various occasions – considered below – the French Court of Cassation has held that the adoption of the child by the intending mother is prohibited since surrogacy violates French public policy.⁵⁷ Moreover, the establishment of the legal maternity of a woman other than the birth mother constitutes a *fraude à la loi* because Articles 16-7 and 16-9 French Civil Code provide that surrogacy violates French public policy.⁵⁸

Given the impossibility to establish legal motherhood, the only option to provide some form of legal relationship with the surrogate-born child would include the intending mother acquiring parental responsibility (Article 337 French Civil Code) or, albeit in the most exceptional circumstances, by means of acquiring a guardianship status with respect to the child (Article 373(3) French Civil Code).

(b) The grounds for legal paternity or parenthood of the second parent

Under French law, the second parent can only establish his legal parenthood on account of the rules of parentage if he is male; that is, fatherhood can be established on the basis of his marriage to the mother, by his acknowledgement or by apparent status. The female partner of the legal mother of the child can, at present, only establish her legal maternity on account of the rules of adoption.

The basis for legal paternity is considered to be a mixture of genetic paternity and social reality although this does not mean that the legal paternity of the genetic father is always established. The husband of the legal mother is not the legal father if the child is born during a divorce proceeding, and if the person who acknowledged his paternity is not the genetic father of the child, his legal paternity can in principle be contested. Only in the case of fertility treatment with donor sperm is legal paternity not based on genetic paternity but on the man's consent to the treatment. French law takes the view that if the partner of the mother consents to the treatment, it is the partner and not the sperm donor who is responsible for the upbringing of the child (Article 151-8 French Civil Code). If the child is born to an unmarried mother, the man who consented to the medically assisted procreation is obliged to acknowledge his paternity. If the man does not acknowledge his paternity, his legal paternity can be established judicially. Article 311-20 French Civil Code only applies to a married couple or to a man and a woman who are cohabiting. It follows that the provisions of Article 311-20 on the legal paternity of the consenting partner do not

57 Cass. Civ. ass. plén., 31 May 1991, Bull. civ. no. 4; Cass. Civ. 1er, 9 December 2003, D. 2004, 1998. The legal parenthood of French intended parents that has been established abroad in case of surrogacy violates French public policy (Cour d'appel de Rennes, 4 July 2002, D. 2002, 2902; Cour d'appel de Paris, 26 February 2009, La semaine juridique 2009, 83(26), 16.

58 Circulaire relative à la présentation de l'ordonnance nr. 759-2005 du 4 juillet 2005 portant réforme de la filiation, Bulletin officiel du Ministère de la Justice, 25 October 2006, nr. 103, 109-211 (Nor: Jusc0620513C), at 161.

necessarily apply in case of do-it-yourself insemination. In such a case, the legal paternity of the consenting partner can be established on the basis of his marriage to the mother or by his acknowledgement, but it could also be annulled on the basis that he is not the genetic father of the child.

With respect to the intending father, it appears upon review of the existing case law and doctrine that the intending father could establish his legal fatherhood in the context of surrogacy by way of acknowledgement of the child (Article 316 French Civil Code). Until early 2013, on the basis that the surrogate-born child was genetically related to the intending father, acknowledgement was possible. However, since mid-2013, the French Court of Cassation has considered such acknowledgement to run contrary to the French prohibition and therefore an evasion of French law, although, as discussed below, the position may have changed. In one decision dated 13 September 2013,⁵⁹ the Court held that the state had an interest in challenging the legal fatherhood on the basis of Article 332 French Civil Code.⁶⁰

(c) Apparent status

Legal parentage can also be established on the basis of the ‘apparent status’ of a child.⁶¹ Apparent status or *possession d’état* literally means possession of status. Forder and Saarloos observe that an individual possesses a certain status by exercising the rights and performing the duties associated with a certain personal status.⁶² *Possession d’état* as used and understood in this research has been translated as apparent status. If a child has a certain apparent status, it means that from apparent facts, it appears that a certain man or woman is the (legal) father or mother of the child. Such facts are that the child is being raised and supported by the man and the woman, that the child bears their name, and that society in general and the administration considers the man and the woman to be the child’s legal parents. Forder and Saarloos comment that apparent status ‘is only a qualification of a certain fact pattern.’⁶³ This is not the place to provide an exhaustive review of the concept of apparent status but what is important is that apparent status, for French parentage law, is not dependent on genetic affiliation being established.

Apparent status can only serve as a means to establish legal affiliation if the existence of apparent status has been recorded in a judgment (Article 330 French Civil Code) or in

59 *M. X. et autres v. le procureur général près la cour d’appel de Rennes et autres*, Cour de cassation – Première chambre civile, 13 September 2013.

60 *Ibid.*, 275.

61 See M. Parquet, *Droit de la famille* (Broché 2009), 134; see also K. Saarloos, ‘European Private International Law on Legal Parentage? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition in Legal Parentage’ (Dissertation, Maastricht University 2010), 56.

62 C. Forder and K. Saarloos, ‘The Establishment of Parenthood: A Story of Successful Convergence?’ Maastricht Faculty of Law Working Paper No. 2007-01, 9.

63 *Ibid.*, 9.

an affidavit (Article 310-1 in conjunction with Article 317 French Civil Code). According to Article 320 French Civil Code, the establishment of legal affiliation is not possible if legal affiliation with another person already exists.

Article 311-15 French Civil Code provides that if the child and his or her father and mother or one of them has his or her habitual residence in France, together or separate, the apparent status produces the effects according to French law, even if the other elements of the parentage are governed by foreign law. The rules on apparent status in matters concerning parentage are special mandatory rules. As noted by Forder and Saarloos, notwithstanding the fact that Article 311-15 French Civil Code is infrequently used in practice, the article constitutes an important exception to the rule of Article 311-14 French Civil Code that legal parentage is governed by the national law of the mother.⁶⁴ It has already been discussed that on the basis of Article 313 French Civil Code, the mother's husband is not the child's legal father if the child's birth is recorded without mentioning the name of the husband and if the child does not have apparent status with regard to him.

In the context of surrogacy, it would seem that the rules on apparent status could be applied in order to establish legal parentage of the intending parents; the surrogate-born child could arguably have the apparent status of being the child of the intending parents. Yet despite the possible application of these rules, a decision of the Court of Lille on 22 March 2007 has held that the rules cannot be invoked.⁶⁵

(d) Anonymous birth

A birth mother has the right to give birth anonymously in France such that she does not become the child's legal mother.⁶⁶ This is known as *accouchement sous X*. The mother must be fully and personally informed of the legal consequences of her decision.⁶⁷ The French rules on anonymous birth may be used to execute a surrogacy arrangement. As discussed in the context of the Netherlands, a Dutch woman could go to France to give birth anonymously and deliver the child to intending parents from the Netherlands.⁶⁸

⁶⁴ *Ibid.*, 10.

⁶⁵ Tribunal de grande instance de Lille, 22 March 2007. See <www.legalnews.fr/index.php?option=com_content&view=article&id=176662>.

⁶⁶ See also M. Catto, 'La gestation pour autrui: d'un problème d'ordre public au conflit d'intérêts?' [2013] 3 *Revue des droits de l'homme*, 5.

⁶⁷ The existing system of anonymous birthing is embodied in Law no. 93-22 of 8 January 1993, Article L.222-6 of the Social Action and Families Code, as amended by law no. 2002-93 of 22 January 2002 on 'access by adopted persons and people in state care to information about their origins': see paras. 15-18.

⁶⁸ See District Court of The Hague, 14 September 2009, LJN: BK1197 discussed at 3.7.

3.3.3 *Inter-country surrogacy and private international law on parentage*

Under French PIL, legal parentage only exists according to the law that applies to legal parentage as per Articles 311-14, 311-15 and 311-17 French Civil Code. Whether legal parentage exists between the child and the persons mentioned as father and mother in the birth certificate according to the law of the place where the birth record (or the instrument of acknowledgement of parenthood) has been drawn up is irrelevant.

(a) **Conflict of law rules**

Under French law, the conflict of law rules on parentage have universal scope which means that they apply irrespective of the domicile, residence, or the nationality of the persons involved. Article 311-14 French Civil Code connects the child's parentage first to the national law of the mother, and if she is unknown, the child's parentage will be determined by the national law of the child. The rule begs the question when the mother is deemed to be unknown: Does she have to be unknown in law or in fact? If the woman who is mentioned in the child's birth certificate is not the birth mother but the genetic mother or perhaps the intending mother, is her nationality still to be used to determine the child's parentage? How will the 'national law of the child' be applied when, for example, a child is born to a French woman with the egg of a Californian woman? It is probable that the term 'mother' in such a case has to be interpreted as 'birth mother.' As surrogacy violates French public policy, it does not make sense to construct the terms of Article 311-14 French Civil Code in such a way that they violate public policy. If it is unknown who gave birth to the child – which in the case of surrogacy is not unlikely – it seems that the national law of the child, to the extent identifiable, determines legal parentage.⁶⁹ Finally, it must be noted that Article 311-14 applies to the establishment of legal maternity and legal paternity. Thus, it determines the law applicable to establishment *ex lege* and judicial establishment.

The function of Article 311-14 – the determination of the law applicable to judicial establishment of paternity – has been criticised.⁷⁰ It is unclear why an action between the father and the child should be governed by the national law of the mother. Batiffol and Lagarde have labelled it as '*la contradiction flagrante entre la sévérité de la solution pour la recherche de paternité et le laxisme des nouvelles règles sur la reconnaissance, la légitimation et l'action à fins de subsides.*'⁷¹

69 For more, see K. Saarloos, 'European Private International Law on Legal Parentage? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition In Legal Parentage' (Dissertation, Maastricht University 2010), 155-156.

70 The same criticism has been expressed with regard to the Dutch conflict rule for judicial establishment of paternity.

71 H. Batiffol and P. Lagarde, 'L'improvisation de nouvelles règles de conflit de lois en matière de filiation' [1972] 61(1) *Revue critique de droit international privé* 3-26.

The question on the recognition of legal parentage with regard to the intending parent or parents has produced case law from the French Court of Cassation.⁷² In broad terms, French courts appear to have followed one line: denying both adoption and recognition of the parental status of the intending parents for children born of surrogate mothers. The reasoning of the courts has been summarised in the following terms:

The fact that other countries permit surrogacy should not justify the adoption of a practice contrary to French public order. According to the judges, recognising foreign surrogacy would incentivise infertile couples to evade French law by going abroad for surrogacy services and returning afterwards with the child. Moreover, recognition would ultimately lead to legalisation because it would not be sustainable to simultaneously prohibit surrogacy in France while recognising the legality of foreign surrogate contracts. Finally, French courts point out that the child's best interest is intact because he still has a legal status in the foreign country where the surrogacy contract was formed.⁷³

This brings us to the topic of recognition.

(b) Recognition of legal parentage in foreign judgments

Reference should be made to a case involving French resident nationals who engaged a surrogate in Minnesota, USA. Both the French First Instance Court and the Paris Court of Appeal ruled against same-sex couple. The debate focused on whether the American judgment on parentage could be recognised in France (it does not seem that the issue of whether the birth certificate could be recognised was raised). The Court only explored whether one of the conditions was fulfilled, namely, whether the foreign judgment complied with French public policy. It simply held that it did not, as the French Civil Code provides that surrogacy is forbidden in France and that the rule is mandatory.⁷⁴

Similarly, on the grounds of contravening public policy and incompatibility with the rules of French law of filiation on the establishment of paternal filiation with respect to two men, the Court of Paris rejected the exequatur of a Californian judgment made in favour of two men in a French civil partnership (a PACS⁷⁵) who had entered into a surrogacy agreement with an American couple.⁷⁶

⁷² See Cass. civ. 1st, 6 April 2011 (3 decisions): Appeal No. 10-19.053, Appeal No. 09-66.486 and Appeal No. 09-17.130.

⁷³ L. Bertilotti, New York University JPIL Online Forum Commentary, 'The Prohibition of Surrogate Motherhood in France', 31 January 2012, available at: <<http://nyujilp.org/the-prohibition-of-surrogate-motherhood-in-france-2/>>.

⁷⁴ See <<http://conflictoflaws.net/2009/french-court-denies-recognition-to-american-surrogacy-judgement/>>.

⁷⁵ French: *pacte civil de solidarité*.

⁷⁶ CA Paris, 17 March 2011, Decision No. 10/09648.

(c) Recognition of legal parentage in foreign authentic acts

The Court of Rennes has allowed the registration in the French civil status register of birth certificates properly issued in India for twins born to a surrogate and conceived with the gametes of a Frenchman. The Public Prosecutor's Office appealed the decision on the basis of Article 16-7 French Civil Code. The Court of Appeal of Rennes confirmed the judgment deeming it necessary only to recognise a foreign civil status document that was properly drawn up locally and not to rule on the validity of the surrogacy agreement, since that issue had not been brought before the Court on appeal.⁷⁷ The Public Prosecutor's Office appealed against the judgment.⁷⁸ It is worth pausing here to consider the effort of judges to separate the question of the validity of the surrogacy agreement from the registration of a child's birth certificate. Yet the solution adopted – the registration of the birth certificates – appears to contravene the case law of the Court of Cassation.⁷⁹ The Court of Rennes tried to put a different view on the issue by noting that the circumstances were different to those decisions given: (1) the absence of fraudulent maternal filiation established in the civil status documents presented to the Court and (2) that this was not a matter of a request for the exequatur of a foreign judgment.

Another example is of twins born in 2000 to a French married couple by a surrogate in California.⁸⁰ The children were denied French passports by the French Consulate, and they travelled to France as US passport holders. A Californian Court had, by way of a judgment, conferred parental status on the intending French parents before the birth of the children and ordered both the hospital in San Diego and the Californian Department of Public Health to transcribe the couple as the only parents on the hospital registry and the birth certificates. The couple could have sought recognition in France of (1) the Californian judgment or (2) the birth certificates. Civil proceedings were initiated by the

77 CA Rennes, 21 February 2012, Decision No. 11/02758. See also CA Rennes, 29 March 2011, Decision No. 10/02646. In that case, two children were born in Bombay in 2009 (from an unknown mother) and were acknowledged in June 2009 in Nîmes by their father. The Consul General of France refused to register the birth certificates on the basis that the birth certificates did not mention the name of the mother. The birth certificates were, however, amended and the name of the mother was added. But the office of the Public Prosecutor insisted in its refusal, suspecting a surrogacy arrangement. The Court of Appeal of Rennes considered that the Prosecutor's office (in charge of demonstrating the fraud) did not bring forward proof of its suspicions and ordered as a result the registration. A different approach was taken by the Court of Appeal of Rennes, 10 January 2012, Decision No. 11/02758. In that case, the Court found that the surrogacy contract was prohibited by French law and that a purchase of child is contrary to public policy. The transcription of the birth certificate was denied.

78 'Enfin, la Cour relèvera qu'elle n'est pas saisie de la validité d'un contrat de gestation pour autrui, mais de la transcription d'un acte de l'état civil dont ne sont contestées ni la régularité formelle, ni la conformité à la réalité de ses énonciations. Dès lors que cet acte satisfait aux exigences de l'article 47 du code civil, sans qu'il y ait lieu d'opposer ou de hiérarchiser des notions d'ordre public tel l'intérêt supérieur de l'enfant ou l'indisponibilité du corps humain, le jugement déferé sera confirmé en toutes ses dispositions.'

79 Cass. civ. 1st, 6 April 2011.

80 The French text of the decision can be found at <www.davidtate.fr/Cour-d-appel-de-PARIS-1ere-Chambre>, 1039.

prosecutors in France against the non-recognition of the Californian birth certificates. The Court ruled that the children should be considered for all purposes as the intending parents' daughters. The reasoning of the Court of Appeal of Paris has been summarised as:

As the plaintiffs have not challenged the recognition of either of these acts in France, their challenge of the transcription of the parental status on the French registries is inadmissible. The foreign acts govern.

The plaintiffs did not challenge the accuracy of the content of the transcription, but only the transcription itself. The issue of whether the couple was actually the parents of the children was therefore not before the court.

Finally, and in any case, failure to provide the couple with a parental status would result in the children having no parents legally speaking, which would not comport with the superior interest of the children.⁸¹

Cuniberti suggests that the outcome could have been different '*if the accuracy of the content of the transcription had been challenged, and this is maybe what the court rules implicitly by noting that there was no such challenge.*'⁸²

(d) Evasion of the law

On 19 March 2014, the French Court of Cassation held that an Indian surrogacy arrangement would be denied effect in France on the ground that it aimed at strategically avoiding the application of French law (*fraude à la loi*).⁸³ A Frenchman had entered into a surrogacy agreement with an Indian woman in Mumbai. Following the birth of the child, the man attempted to register the child as his son in the relevant French status registry. A French prosecutor challenged the registration. A Court of Appeal rejected the challenge on the grounds that it was not alleged that the applicant was not the father and decided that the birth certificate was legal. The Court of Cassation allowed the appeal of the French prosecutor's office and ruled that the behaviour of the French resident national was aimed at avoiding the application of French law and the registration would be deleted.⁸⁴

81 G. Cuniberti, 'Flying to California to Bypass the French Ban on Surrogacy', 5 November 2007, *available at*: <<http://conflictoflaws.net/2007/flying-to-california-to-bypass-the-french-ban-on-surrogacy/>>.

82 *Ibid.*

83 Arrêt n° 281 du 19 mars 2014 (13-50.005), *available at*: <www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/281_19_28731.html>.

84 *Ibid* (the Court held: 'Attendu qu'en l'état du droit positif, est justifié le refus de transcription d'un acte de naissance fait en pays étranger et rédigé dans les formes usitées dans ce pays lorsque la naissance est l'aboutissement, en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public selon les termes des deux premiers textes susvisés').

(e) Best interests of the child, family life, and public policy

The French Court of Cassation delivered on 6 April 2011 three judgments, which ruled that foreign surrogacy agreements violate French public policy.⁸⁵ In each of the three cases, the child or children were born in a state of the US where the practice was lawful (California once, Minnesota twice). In a common press release, the Court of Cassation noted the two issues: (1) did the American judgments confirming parenthood on the intending parents violate public policy? And (2) if so, should they be nevertheless recognised? As summarised by Cuniberti, each of the judgments gave the same reasons:

The foreign (i.e. American) birth certificate could not be transcribed in the French civil status registry. The reason why was that the foundation of the birth certificate was a foreign judgment which violated French public policy. Under present French law ('en l'état du droit positif'), surrogacy agreements violate a fundamental principle of French law.

The fundamental principle of French law is the principle that civil status is inalienable. Pursuant to this principle, one may not derogate to the law of parenthood by contract.

This outcome does not violate Article 8 of the European Convention of Human Rights, as the children have a father in any case (i.e. the biological father), a mother under the law of the relevant US state, and may live together with the French couple in France.

This outcome does not violate either Article 3-1 of the New York Convention on the Rights of the Child and the best interest of the child rule (no reason given for this statement). It simply held that it did not, as the Civil code provides that surrogacy is forbidden in France (Article 16-7 of the Civil Code), and that the rule is mandatory (d'ordre public: see Article 16-9 of the Civil Code).⁸⁶

The intending parents and children in two of the three cases submitted a complaint to the European Court of Human Rights with that Court giving judgment in both matters on 26 June 2014.⁸⁷ The applicants in the *Mennesson* case are a husband and wife, Dominique and Sylvie Mennesson, French nationals born in 1955 and 1965, respectively, and Valentina Mennesson and Fiorella Mennesson, twins born in 2000. They live in Maisons-Alfort

⁸⁵ Cass. 1e Civ., 6 April 2011, n° 09-66.486; Cass. 1e Civ., 6/04/2011, n° 09-17.130) see <www.courdecassation.fr/case_law_2/premiere_chambre_civile_568/presidence_relatif_19635.html>.

⁸⁶ G. Cuniberti, 'Surrogacy Agreements Violate French Public Policy', 7 April 2011, available at: <<http://conflictoflaws.net/2011/surrogacy-agreements-violate-french-public-policy/>>.

⁸⁷ *Sylvie Mennesson v. France* (Application No. 65192/11) and *Francis Labassee and others v. France* (Application No. 65941/11), introduced on 6 October 2011. The judgments (in French) handed down by the Strasbourg Court are considered further in Chapter Four.

(France). The applicants in the second case⁸⁸ are husband and wife Francis and Monique Labassee, French nationals born in 1950 and 1951, respectively, and Juliette Labassee, an American national born in 2001.

Judgments on parentage given in California in the first case held that Mr. and Mrs. Mennesson were Valentina's and Fiorella's parents and in Minnesota in the second case held that Mr. and Mrs. Labassee were Juliette's parents. The French authorities, suspecting that the cases involved surrogacy arrangements, refused to enter the birth certificates in the French register of births. In both cases, as summarised above, the applicants have been unable to secure recognition under French law of the legal parent-child relationship between the surrogate-born children and the intending parents.

In *Mennesson*, the birth certificates were entered in the register on the instructions of the public prosecutor, who subsequently brought proceedings with a view to having the entries annulled. In *Labassee*, the couple did not challenge the refusal to register the birth but sought to have the legal relationship recognised on the basis of *de facto* enjoyment of apparent status. They obtained an *acte de notoriété*, a document issued by a judge attesting to the status of son or daughter, but the public prosecutor refused to enter this in the register. The couple initiated court proceedings. The applicants' claims were dismissed by the Court of Cassation on 6 April 2011 on the grounds that recording such entries in the register would give effect to a surrogacy agreement that was null and void on public policy grounds; the surrogacy agreement '*creates an obstacle in France to the de facto child-parent relation invoked for the establishment of parentage as a consequence of this agreement, illegally concluded abroad, regardless of its legality abroad, as a result of its incompatibility with French international public policy.*'⁸⁹

The Court observes that:

the situation thus reserved to the child, which does not deprive [the child] from the parentage that [the State in which he was born] recognises, nor prevents [the child] from living with those raising him in France, does not affect the right to respect for private and family life of the child within the meaning of article 8 of the ECHR, nor does it affect its best interests [...].⁹⁰

The reasoning of the Court of Cassation is arguably contradictory. If the intending parents of the child do not have parentage in the sense of French law, they do so, however, in the sense of the law of Minnesota and, for the Court, that is sufficient in the furtherance of the child's interests and of France's public policy against surrogacy. The consequence of

⁸⁸ Decisions of the Première Chambre Civile of the Cour de Cassation (Arrets Nos 369, 370, 371 of 6 April 2011).

⁸⁹ C. Cass, 1st Civ, 6 April 2011 *Labassée*/MP.

⁹⁰ *Ibid.*

such reasoning leads to the bifurcation of parenthood. This reasoning also begs a number of questions: As the children's position is anomalous under French law, how is the relationship with the family members of the intending parents to be described? If the statutory prohibition on surrogacy has so little effect for day-to-day purposes for this family, is the legal ban itself empty of substance? Would recognition (or at least some form of legal protection) bring greater clarity to the established relationships?

The applicants in *Mennesson* and *Labassee* brought proceedings before the European Court of Human rights.⁹¹ Relying on Article 8 ECHR (right to respect for private and family life), the applicants complained of the fact that, to the detriment of the children's best interests, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad. The applicants in *Mennesson* further alleged, in particular, a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8, arguing that their inability to obtain recognition placed the children in a discriminatory legal situation compared with other children when it came to exercising their right to respect for their family life.

In both cases, the Strasbourg Court held, unanimously, that there had been no violation of Article 8 ECHR concerning the applicants' right to respect for their family life but that there had been a violation of Article 8 concerning the children's right to respect for their *private life*. The Court observed that the French authorities, despite being aware that the children had been identified in the USA as the children of Mr. and Mrs. Mennesson and Mr. and Mrs. Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's identity within French society. The Court further noted that as French law completely precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their genetic father, this overstepped the wide margin of appreciation left to states in the sphere of decisions relating to surrogacy. The implications of the judgments of the European Court of Human Rights are considered further in Chapter Four.

3.3.4 *Nationality of the child*

Given France's prohibition, it is unsurprising that there are no specific rules foreseeing nationality in the context of surrogacy.⁹² That being so, it is assumed that the general rules on the acquisition of French nationality at birth apply. Broadly speaking, French nationality

91 English summaries of each decision are available via <www.hudoc.echr.coe.int>. The facts set out in these summaries are set out here.

92 See response of the French respondent to the Council of Europe's 'Study for the Feasibility of a Legal Instrument in the Field of Nationality Law and Families (Including the Promotion Of Acquisition Of Citizenship' CDCJ (2012)) 11 at 100.

law applies *ius sanguinis* to individuals who are born to at least one French national⁹³ or *ius soli* in certain cases: foundlings⁹⁴ or to people born to persons of unclear nationality or who would be stateless otherwise.⁹⁵ Acquisition of nationality at birth occurs either if the person is born in France or abroad. Parentage has an effect on the transmission of nationality if it is established before the age of 18.⁹⁶ Yet in the *Mennesson* case⁹⁷ (discussed above), after five court decisions in the course of ten years, the Court of Cassation ruled that the girls were not French citizens. An editorial in *Le Monde* cried: ‘*How do you justify depriving these children, now strangers in their parents’ country, of all the rights connected with citizenship, based solely on the way they were conceived and when there is no dispute over their parentage? What are they guilty of, besides their birth, to merit such sanctions?*’⁹⁸

A change in practice occurred in early 2013. The publication of Circular CIV/02/13 on 25 January 2013 dealing with the issuance of certificates of French nationality (CNF) to children born abroad of French citizens now enables the French civil status registry to record surrogate-born children as French nationals.⁹⁹ The objective being to find an interim solution: ‘*En permettant aux greffiers d’accorder un certificat de nationalité française, les enfants bénéficient des mêmes droits mais le lien parents-enfants n’est pas clairement reconnu. Et ce, même s’il faut automatiquement qu’au moins l’un des deux parents soit français.*’¹⁰⁰ This was the subject of much debate and was accused of being invalid on the basis that it improperly circumvented the legislative process. However, a 2013 Court of Cassation decision¹⁰¹ directly ignored the administrative order and confirmed the position of the Court, expressed in the *Mennesson* case in 2010, that children born by surrogacy agreements cannot be granted French civil status.

The questions raised by applications for travel documents are different. The *Conseil d’Etat* (Council of State) has arguably provided some recognition to a surrogacy agreement entered into abroad on the basis of providing civil status to the child. The Council of State has thus issued travel documents to twin girls born abroad so that they could stay in France with the man who had acknowledged paternity of them.¹⁰²

93 Articles 18 and 18-1 French Civil Code.

94 Article 19 French Civil Code.

95 Article 19-1 French Civil Code.

96 See for an overview of the French rules on nationality the country profile submitted to EUDO Citizenship database by C. Bertossi and A. Hajjat, last update January 2013 available at: <<http://eudo-citizenship.eu/country-profiles/?country=France>>.

97 *Mennesson v. France*, Application No. 65192/11.

98 *Ibid.*

99 The CIV is available at: <www.gisti.org/IMG/pdf/circ_20130125_norjusc1301528c.pdf>. See also <www.lexpress.fr/actualite/societe/meres-porteuses-que-change-la-ciculaire-taubira-sur-la-gpa_1215190.html>.

100 See <www.lexpress.fr/actualite/societe/meres-porteuses-que-change-la-ciculaire-taubira-sur-la-gpa_1215190.html>.

101 Arrêt n° 1091 du 13 septembre 2013 (12-30.138) – Cour de cassation – Première chambre civile – Judgment No 1091 of 13 September 2013 (12-30.138).

102 4 May 2011, Decision No. 348778, Minister of State, Minister of Foreign and European Affairs.

On the basis of Article 3(1) Convention on the Rights of the Child and Article 8 ECHR, the Administrative Court of Paris also gave a summary ruling that the refusal to issue a travel document to a child where a Frenchman has acknowledged paternity of a child born by a surrogacy agreement in Ukraine constitutes ‘a grave and manifestly illegal attack on the best interests of the child, his right to move freely and the respect for his private and family life’ and instructed the consular authorities to issue the document allowing the child to enter France.¹⁰³

3.3.5 Birth registration and records

In those (few) circumstances where an intending father has acknowledged the child successfully or legal paternity has been established under French law, it appears that the birth of the child can be registered and recorded in France and the *livret de famille* (a family book) is created (if this is the father’s first child) or updated. Details of the surrogate, it is assumed, will be transcribed. In those (more frequent) circumstances where the filiation is not recognised or established by law, no clear practice has emerged or guidance issued with respect to the topic of birth registration.

3.3.6 National considerations

Surrogacy has been banned in France since 1991, and under French law, surrogacy violates public policy. Surrogacy attracts legislative opprobrium. Despite this clear legislative position, the recent judgments and the legal reasoning of the French courts, the decisions of the European Court of Human Rights illustrate the complexity of enforcing a national prohibition in a globalised world, where other states permit surrogacy agreements and (infertile) intending parents travel abroad to find surrogate.

The *Conseil d’Etat* during the review of the French Bioethics Act 1994 in July 2011 advocated that intending fathers in cross-border surrogacy cases should be able to acknowledge paternity to establish their legal parenthood. In particular, the *Conseil d’Etat* suggested that ‘the prohibition of the establishment of maternity between the intending mother and the child should be maintained’; however, ‘acknowledgement of paternity should become the main alternative to the prohibition of surrogacy.’¹⁰⁴

In terms of legislative proposals, an Information Report of the French Senate 2007-2008 on surrogacy concluded with the following framework conditions regulating surrogacy¹⁰⁵:

103 Tribunal Administratif Paris, 15 November 2011, Decision No. 1120046.

104 ‘La Révision Des Lois de Bioéthique’ étude du Conseil d’État parue à la Documentation française, in particular at 47-54.

105 ‘Contribution à la réflexion sur la maternité pour autrui’, Information Report No. 421, 25 June 2008, French Senate, available at: <www.senat.fr/rap/r07-421/r07-4211.pdf>.

- i. Strict eligibility conditions for the intending parents (opposite sex married couple or opposite sex cohabiting couple) of at least two years must be of procreative age and domiciled in France. Same-sex couples (married or otherwise) are ineligible.
- ii. The intending mother must be unable to fall pregnant or carry a child.
- iii. At least one of the intending parents must be a genetic parent of the child.
- iv. There must be conditions relevant to the surrogate such as age.
- v. There must be a legal but non-contractual regime with respect to the surrogacy agreement.

As yet, these recommendations have not been acted upon although a legislative proposal has been submitted to the French Senate to permit the transcription of foreign birth certificates in the context of children born by way of surrogacy.¹⁰⁶ The proposal reads: '*Article 33.6-2. When the civil status of a child born by way of surrogacy is established by a foreign authority in conformity with its law, this civil status shall be transcribed in the French Civil Register without challenge.*'¹⁰⁷

Given the Strasbourg Court's decisions in *Labassee* and *Mennesson*, it is now for France to consider what legislative action, if any, the state will take to respond to the Article 8 ECHR violation and what steps will be taken to amend its legislation to bring it into line with the ECHR.¹⁰⁸

106 'Proposition de loi autorisant la transcription à l'état civil français des actes de naissance des enfants nés à l'étranger du fait d'une gestation pour autrui,' French Senate session No. 736 2011-2012, available at: <www.senat.fr/leg/pp11-736.html>.

107 *Ibid.* 'Article 336-2. – Lorsque l'état civil de l'enfant a été établi par une autorité étrangère en conformité avec une décision de justice faisant suite à un protocole de gestation pour autrui, cet état civil est transcrit dans les registres français sans contestation possible aux conditions que la décision de justice soit conforme aux lois locales applicables, que le consentement libre et éclairé de la femme qui a porté l'enfant soit reconnu par cette décision et que les possibilités de recours contre cette décision soient épuisées.'

108 The implications of these judgments are discussed in Chapter Four at 4.11.3 and 4.11.4.

3.4 SWITZERLAND

3.4.1 Overview of domestic approach¹⁰⁹

In Switzerland, Article 119 of the Federal Constitution of 18 April 1999 and Article 4 of the Federal Law of 18 December 1998 on Medically Aided Reproduction prohibit all forms of surrogacy (LPMA).¹¹⁰ Article 119 Swiss Federal Constitution reads:

Reproductive medicine and gene technology involving human beings

1. Human beings shall be protected against the misuse of reproductive medicine and gene technology.

2. The Confederation shall legislate on the use of human reproductive and genetic material. In doing so, it shall ensure the protection of human dignity, privacy and the family and shall adhere in particular to the following principles: [...]

c. The procedure for medically-assisted reproduction may be used only if infertility or the risk of transmitting a serious illness cannot otherwise be overcome, but not in order to conceive a child with specific characteristics or to further research; the fertilisation of human egg cells outside a woman's body is permitted only under the conditions laid down by the law; no more human egg cells may be developed into embryos outside a woman's body than are capable of being immediately implanted into her.

d. The donation of embryos and all forms of surrogate motherhood are unlawful.

e. The trade in human reproductive material and in products obtained from embryos is prohibited. [...]

¹⁰⁹ The author is grateful to and acknowledges his discussions with Stephan Auerbach of the Swiss Foundation of the International Social Service. This analysis is based on M. Wells-Greco, 'Maternité de substitution : A quels parents et à quelle(s) nationalité(s) les enfants ont-ils le droit?' published by the Institut Universitaire Kurt Bösch (IUKB) in its 2014 Congress report. Extensive reference is also given to the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by Switzerland (*available at*: <www.hcch.net>) and the 2013 report of the Swiss Federal Council, 'Rapport sur la maternité de substitution', Rapport du Conseil fédéral du 29 novembre 2013 en exécution du postulat 12.3917 du 28 septembre 2012 (on file with author) ('Swiss Federal Report'). Here the terms 'social mother', 'social father', and 'social parents' are used for parents who are not genetically related to their children due to adoption or the use of ART in order to comply with the terminology used in Switzerland. The author has provided English translations from the French language version of the Swiss Federal Report as quoted in this thesis.

¹¹⁰ LPMA; RS 810.11. LPMA *available at*: <www.admin.ch/opc/fr/classified-compilation/20001938/>; T Geiser, 'Gleichheit im Familienrecht-Schweiz', in *Gleichheit im Familienrecht*, B Verschraegen (ed.), 97. See also D. Masméjan, 'Mère porteuse – Une pratique interdite en Suisse', *Le Temps*, 1 February 2013, *available at*: <www.letemps.ch/Page/Uuid/4df4aa94-6c74-11e2-8abf-80e1b0de70dd/Une_pratique_interdite_en_Suisse>.

g. Every person shall have access to data relating to their ancestry.

Given the principles set out in the Swiss Federal Constitution, the LPMA is very restrictive regarding the types of ART that are allowed and the persons eligible to make use of ART in Switzerland.¹¹¹ The LPMA prohibits, for example, the donation of eggs¹¹² and embryos and any sort of surrogacy.¹¹³ The intention is to restrict any support to procedures, which would lead to relationships which could not naturally occur, such as a divergence between the genetic and birth mother.

As has been observed with respect to France, it is interesting to note that the LPMA is limited in territorial terms such that the law itself does not extend to IVF or surrogacy undertaken in a foreign jurisdiction; this would include Swiss residents or Swiss nationals that engage in such processes outside of Switzerland. Equally, Article 119(2) Swiss Federal Constitution does not specifically relate to assisted reproduction abroad, and so it must be assumed that it refers exclusively to proceedings in Switzerland.

What is clear is that a surrogacy agreement is void; the content of the agreement is deemed illegal and unlawful, and any purported contractual obligations are not enforceable.¹¹⁴

Any person executing prohibited surrogacy or IVF procedures is subject to the risk of prison or fines up to CHF 100,000 (approximately Euro 80,000) depending on the breach in question.¹¹⁵ The same penalty shall apply to any person who acts as an intermediary.¹¹⁶ However, neither the surrogate nor the intending parents face criminal sanctions in such circumstances.

3.4.2 *Legal parenthood in the context of surrogacy*

Swiss law does not specifically regulate the consequences of surrogacy in the field of parentage. Accordingly, the regular rules in the field of parentage, parental responsibility and child protection apply in these cases. The legal position of a child born as a result of

111 Fédéral Council (2013), 'Message concernant la modification de l'article constitutionnel relatif à la procréation médicalement assistée et au génie génétique dans le domaine humain (Article 119 Constitution) et de la loi fédérale sur la procréation médicalement assistée (diagnostic préimplantatoire) du 7 juin 2013', 13.051, FF 2013 5253; available at: <www.admin.ch/opc/fr/federal-gazette/2013/5253.pdf>.

112 The Swiss Parliament has discussed the possibility of providing for egg donation (parliamentary initiative). For background information and the history of legislation, see <www.bag.admin.ch/themen/medizin/03878/03880/index.html?lang=en>.

113 Article 31 LPMA reads: 'Maternité de substitution: 1. Quiconque applique une méthode de procréation médicalement assistée à une mère de substitution sera puni de l'emprisonnement ou de l'amende. 2. Sera puni de la même peine quiconque sert d'intermédiaire à une maternité de substitution.'

114 Article 20 al. 1 of the federal Act on the Amendment of the Swiss Civil Code of 30 March 1912.

115 Article 37 LPMA.

116 Article 31 LPMA.

surrogacy is uncertain and dependent upon the parties involved in the surrogacy and their (genetic) relationship and particular wishes with respect to the child.

(a) The grounds for legal maternity

Under Swiss law, a child's legal mother is deemed to be the birth mother. Legal maternity is automatic, and no act of acknowledgement or registration is necessary.¹¹⁷ The child has only one legal mother; in the context of surrogacy, the surrogate is the legal mother of the child.¹¹⁸ Swiss commentators are of the view that this position holds true independent of whether the birth mother is also the genetic mother.¹¹⁹ There is therefore little doubt that the surrogate is the legal mother of the surrogate-born child at the time of the child's birth. That being so, provided the conditions for adoption can be met, the intending mother will have to consider adoption to acquire parentage.

(b) The grounds for legal paternity or parenthood of the second parent

The father is deemed to be the man who is married to the mother at the time of the birth¹²⁰ or who has acknowledged/recognised his paternity¹²¹ or whose paternity has been established in judicial proceedings.¹²² This paternity assumption takes effect even if the husband is aware that the woman conceived the child by another man (be it by way of sperm donation or natural conception) and has consented to the conception. If he has consented, he cannot contest his paternity.¹²³ This means that a genetic link between a father and child is not crucial for a legal relationship; rather the relational link relies on a social or a legal element (for example, the existence of a marriage).

If a couple is unmarried, the child may be recognised by his or her father¹²⁴ by way of declaration before an officer of the municipal registry of births, in court, or by last will. Once the acknowledgement is authenticated by the national authorities, the acknowledger is considered a legal parent of the child for all purposes. The recognition is retrospective to the birth date. If a woman is unmarried and no man recognises the child, fatherhood can be determined by court decision.¹²⁵

If neither the intending father nor the intending mother has a genetic link with the child, then he or she must adopt the child under the usual adoption procedures, although

117 Article 252 Swiss Civil Code.

118 A. Gibson *et al*, 'Assisted Reproductive Technology and Inheritance Law: Differing Jurisdictional Approaches to Determining Heirship in the World of Modern Reproduction' [2013] 19(2) *Trusts & Trustees* 190-214.

119 I. Schwenzer, 'CC 252 art, fn 9ff' in H. Honsell, N. Vogt and T. Geiser (eds.), *Civil Code I*, Art 1-456 CC, *Basel Commentary* (4th ed., Zurich 2010).

120 Article 255(1) Swiss Civil Code.

121 Article 260(1) Swiss Civil Code.

122 Article 252(2) Swiss Civil Code.

123 Article 252(7) Swiss Civil Code.

124 Article 260 Swiss Civil Code.

125 Article 261 Swiss Civil Code.

this option presupposes that the intending parents are married. Furthermore, they must meet the conditions and requirements of adoption, and if they do not meet said requirements, they cannot legally become the child's parents. Under current Swiss law, same-sex partners cannot adopt a child.¹²⁶ This is due to the fact that adoption is an option reserved for married couples; where a child is bought up in a same-sex family unit, it often means that the child only has one legal parent.¹²⁷

Although a 2014 administrative decision in the Canton of Saint Gallen¹²⁸ and the 2013 Swiss Federal Report provide helpful guidance, it is not possible to determine the consistency of the current practice across Switzerland (and its 26 cantons) regarding the establishment and recognition of parenthood of surrogate-born children.

3.4.3 *Inter-country surrogacy and private international law on parentage*

In most surrogacy cases, it would be difficult to conceal that a prohibited form of ART was used abroad because the official birth documents will show that one or both parents are not the legal parents.¹²⁹ Nevertheless, it appears that there are a number (albeit unquantifiable) of Swiss-based intending parents (heterosexual and homosexual) travelling to surrogacy-friendly jurisdictions and returning to Switzerland with a child(ren) for whom they wish to be recognised as the legal parents. They will either submit a foreign court judgment on parentage to a Swiss court for recognition, or they will submit for transcription the foreign birth certificate to the competent cantonal registry of births.

(a) **Conflict of law rules**

Federal law of 18 December 1987 on Private International Law (as amended) (LDIP)¹³⁰ provides for applicable law rules concerning parentage as well as rules of recognition with respect to foreign judgments or decisions relating to parenthood. Articles 25 and 70 LDIP set out the conditions relevant to recognition and jurisdiction. The recognition principle provides that '[a] foreign decision shall be recognised in Switzerland: a. if the judicial or

126 Article 28 Federal Law on Registered Partnerships of Persons of the Same Sex 2004 reads 'Adoption et procréation médicalement assistée: Les personnes liées par un partenariat enregistré ne sont pas autorisées à adopter un enfant ni à recourir à la procréation médicalement assistée.' See <www.admin.ch/opc/fr/classified-compilation/20022194/201307010000/211.231.pdf> and <www.ejpd.admin.ch/content/dam/data/gesellschaft/gesetzgebung/eingetragene_partnerschaft/infoblatt-e.pdf>.

127 A foreign decision pronouncing a same-sex adoption, may be recognised.

128 Urteil Verwaltungsgericht, B 2013/158, 19 August 2014 (available only in German) available at: <www.gerichte.sg.ch/content/gerichte/home/dienstleistungen/rechtsprechung/verwaltungsgericht/entscheide-2014/b-2013-158.html>. Discussed further below at 3.4.3(c).

129 This would be a case unless a foreign jurisdiction provides for a pre-birth adoption or the social parents forge the foreign birth records.

130 A. Bucher with Helbing and Lichtenhahn and commented together with A. Bonomi *et al*, 'Commentaire romand, Loi sur le Droit International Privé' (on file with author).

administrative authorities of the state where the decision was rendered had jurisdiction; b. if the decision is no longer subject to any ordinary appeal or if it is a final decision; and c. if there is no ground for denial within the meaning of Article 27. Article 27 LDIP provides for a public policy exemption such that if a foreign decision is considered to be manifestly incompatible with Swiss public policy, then it will not be recognised.

According to Article 32 LDIP (Entry in the register of civil status), ‘1. A foreign decision or deed pertaining to civil status shall be recorded in the register of civil status pursuant to a decision of the cantonal supervising authority in matters of civil status. 2 The permission to record shall be granted provided that the requirements set forth in Articles 25 to 27 are fulfilled. 3 The persons concerned shall first be heard if it is not established that the rights of the parties have been sufficiently respected during the proceedings in the foreign state where the decision was rendered.’ The conditions of Article 32 must therefore be satisfied if a foreign birth certificate is to be recognised as validly establishing the legal parentage of those persons recorded within it (i.e., the recognition of the content of the certificate). The grounds of non-recognition are the same general ones as for all other recognitions of foreign decisions in Swiss PIL (Articles 25 and 27 LDIP).

Article 68 LDIP provides that the establishment, declaration and denial of a parent-child relationship are governed by the law of the state of the child’s habitual residence. However, if neither parent is domiciled in the state of the child’s habitual residence and if the parents and the child are nationals of the same state, the law of such state applies.

Article 70 LDIP provides that foreign decisions relating to a declaration or denial of a parent-child relationship shall be recognised in Switzerland if they were rendered in the state of the child’s habitual residence or in the child’s national state or in the state of domicile or the national state of the mother or father.

With respect to the law applicable to an acknowledgement¹³¹ of a child by an intending father, Article 72 LDIP provides that an acknowledgement in Switzerland may be made in accordance with the law of the state of the child’s habitual residence, the law of the child’s national state or the law of the domicile or of the national state of the mother or the father; that the form of the acknowledgement in Switzerland is governed by Swiss law; and that the objections to an acknowledgement are governed by Swiss law. With respect to an acknowledgement made or objected to in a foreign country, Article 73 LDIP provides that the acknowledgement of a child made in a foreign country shall be recognised in Switzerland provided it is valid in the state of the child’s habitual residence, in the child’s

¹³¹ Article 71 LDIP provides with respect to the jurisdiction concerning an acknowledgment: ‘1. The Swiss authorities at the child’s place of birth or habitual residence, as well as those of the domicile or the place of origin of the mother or father, have jurisdiction to receive the acknowledgment of a child. 2. When such acknowledgment takes place in a judicial proceeding, in which the parent child relationship is legally relevant, the judge before whom the action is pending may also receive the acknowledgment. 3. The courts having jurisdiction to entertain an action for a declaration or denial of a parent-child relationship also have jurisdiction to rule on objections to an acknowledgment’ (Articles 66 and 67).

national state or in the state of domicile or the national state of the mother or the father. These provisions are of relevance in cases of inter-country surrogacy.

(b) Recognition of legal parentage in foreign judgments

The question of recognition is likely to manifest itself in a number of circumstances. These include the question of recognition of a foreign judgment on parenthood which has been handed down in favour of the Swiss resident (perhaps also national) intending parents or it could relate to intending parents who are residents elsewhere but are of Swiss nationality. Moreover, the foreign judgment could be handed down in a state in which surrogacy is permitted such as in the Ukraine or in certain US states or in a jurisdiction in which surrogacy is not permitted *per se* (such as where there is no law providing for the practice of surrogacy) but nevertheless a judgment is handed down to confirm the intending parents as having the status of parents in that particular jurisdiction.

Article 119(2) Swiss Federal Constitution does not directly apply to the recognition of foreign judgments in relation to parenthood. However, Article 119(2) read in conjunction with Article 7 Swiss Federal Constitution suggests that when the Swiss forum is seised to recognise a foreign judgment relating to parenthood and that judgment is based on a surrogacy arrangement, then such recognition may fall foul of the Constitutional requirements that the protection of human dignity, in particular that of a child, is upheld.

It can also be deduced from Article 7 Swiss Federal Constitution that when filiation is established in accordance with foreign law and ‘enjoyed or crystallised’ over a period of time such that the child enjoys family life with his or her parents, the non-recognition thereof would be contrary to Swiss public policy. A tentative conclusion is that, Article 7 may well require non-recognition in the context of surrogacy where such non-recognition is, on balance, necessary in order to protect the dignity of the surrogate mother or the child. However, when the best interests of the child favour the recognition of parenthood, Article 70 LDIP does provide for a system of recognition.

(c) Recognition of legal parentage in foreign authentic acts

The recognition of foreign birth certificates falls under the remit of the cantonal authorities responsible for regulating civil status. In the absence of specific authority and procedures, it is the relevant cantonal authority responsible for regulating civil status which is tasked with recognising civil status events abroad¹³² and with making a decision on registration. The question of recognition must be examined in light of the general principles of the LDIP, in relation to each individual case. In the case of recognition and transcription of the foreign certificate, the relevant civil registry office records the occurrence in the civil status register. The decision to recognise the foreign civil status document must not be

¹³² Article 32 LDIP.

contrary to Swiss public policy, be it due to the content or to the manner in which the decision was made (formal and substantive public policy).

A 2014 administrative decision in the Canton of Saint Gallen¹³³ provides helpful context. The two Saint Gallen-based intending fathers, in a civil partnership, chose to have a child through the artificial insemination of a donor egg by one of the partner's sperm. A child was conceived through artificial insemination of a surrogate in California. The US birth certificate records that the men are the parents of the child. The American birth certificate was based on a California court judgment of parentage pursuant to which the surrogate and her husband abandoned any parental status with respect to, and responsibilities for, the child. The Saint Gallen Registry Office refused to register the two men as fathers of the child, a decision which the couple appealed successfully. The Swiss federal justice department appealed the Canton's decision, which brought the case to Court. The Court, in its judgment handed down on 19 August 2014, held it to be in the best interests of the child to recognise and transcribe the American birth certificate in the Cantonal register. It ruled that two men were considered the child's legal fathers. The Court partially upheld the justice office's complaint in that it required that the child's genetic and biological parentage (to include details of the surrogate) be recorded in the register in addition to the legal parent-child relationship.

The Federal Justice Department submitted an appeal.¹³⁴ The Federal Court held that the parentage of the second parent established in California could not be recognised in Switzerland – only the intended genetic father and the surrogate would be registered as the child's parents in the civil registry.¹³⁵ There were a number of reasons for this conclusion. Surrogacy and the use of medically assisted reproduction in the context of surrogacy are prohibited in Switzerland. For the Federal Court, recognition of a parental status established in California in circumstances where there was no other connection with the USA (such as residence or American nationality of one of the intending fathers) would be '*fundamentally incompatible with Swiss legal and ethical values ([and contrary to] public policy)*' and unlawful. The Court did, however, leave the door to recognition ajar. This means that Swiss courts and authorities may – albeit in undefined circumstances – recognise a foreign decision on parentage or a birth certificate on the basis that public policy actually requires recognition. How this is applied in practice is yet to be seen.

It is now for this family to decide whether to make an application to the European Court of Human Rights on the basis of a violation of their Article 8 ECHR right to private and family life.

133 Urteil Verwaltungsgericht, 19 August 2014. Discussed further below at 3.4.3(c).

134 'Maternité de substitution : l'Office fédéral de la justice dépose un recours devant le Tribunal fédéral – Berne, 26.09.2014. Available at: <www.news.admin.ch/message/index.html?lang=fr&msg-id=54606>.

135 5A_748/2014.

(d) Best interests of the child, family life, and public policy

In a parliamentary question on surrogacy and the best interests of the child, Jacqueline Fehr¹³⁶ wrote:

Recourse to a surrogate mother is prohibited in Switzerland but not elsewhere. The case recently reported in the media of a couple who engaged a surrogate in Georgia raises the question of the best interests of the child. According to the media, a 52 year old woman engaged a surrogate. The child born in Georgia was brought to Switzerland. The child welfare services intervened and removed the child from the woman on the basis that she left the child in part with her son born of a previous marriage convicted on two accounts for sexual offences. Ms Fehr asked the Federal Council to respond to the following questions:

1. Does Swiss legislation take into consideration the best interests of the child or are there legislative gaps with respect to the engagement of a surrogate abroad?
2. Is the case cited an exception or does it reflect a trend that requires political intervention?
3. Are new international conventions on the topic necessary?

The Swiss Federal Council responded on 11 May 2011¹³⁷ as follows:

1. The best interests of a child are a fundamental principle in matters of assisted reproduction. The Federal Constitution prohibits all types of surrogacy. The law on assisted reproduction prohibits the recourse to a surrogate. From the perspective of civil law, the recognition of parenthood (filiation) relating to a surrogate abroad can be refused by the Swiss authorities or courts as contrary to Swiss public order. The best interests of the child and the avoidance of limping family relations means that a case-by-case analysis is required.
2. The Swiss civil registry has registered recently, in particular following a consideration of foreign birth certificates with a view to their transcription in the civil registry, an increase in requests, due to a suspicion on the part of the registry that the request for registration follows a surrogacy. The Federal Council is following these developments.

136 Curia Vista – Objets parlementaires – Question Mères porteuses. Bien-être de l'enfant. Submitted by Jacqueline Fehr on 14 March 2011 before the Swiss Federal Council, *available at*: <www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20111013>.

137 This is an unofficial and incomplete English translation of the response of the Federal Council *available at*: <www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20111013>.

3. The problems related to the phenomenon of surrogacy are extremely complex, both as to the protection of the child but also in private international law terms. Switzerland is looking for multilateral solutions for the international protection of children with the Hague Conference on Private International Law. The Hague Conference has observed an increase in the use of surrogacy contracts or agreements on the international level and is concerned by the lack of certainty with respect to the child's civil status. At a meeting in June 2010, the Special Commission of the Hague Inter-Country Adoption Convention shared the opinion of Switzerland that the inter-country adoption convention must not be applied in cases of surrogacy.

The non-recognition of foreign judgments in matters of parenthood relating to a child born by means of surrogacy could, according to the Swiss Ministry of Justice, conform to the obligations as set out in Articles 2, 3 and 7 CRC. While no examples are offered, the response of the Swiss national reporter in the HCCH 2014 Questionnaire, suggests that '[p]re-birth consent of the mother violates the *ordre public*.'¹³⁸

On 29 November 2013, the Swiss Federal Council published a report on surrogacy ('Swiss Federal Report').¹³⁹ The Swiss Federal Report notes that despite the prohibition on surrogacy, Swiss residents are engaging with surrogates in a number of jurisdictions, notably India, Ukraine, and certain US States; the Swiss Federal Council concludes that the best interests of the surrogate-born child are protected by existing legislation on a domestic level. However, the Report also concludes that the global approach (or lack thereof) and the absence of international clarification as to rules and protection are insufficient. The Federal Council takes the view that while in most circumstances the intending father, provided he is genetically related to the surrogate-born child, can acknowledge the child under Swiss law and therefore acquire the status of legal father, the position of the intending mother (whether or not genetically related to the surrogate-born child) or the second intending parent is not capable of recognition. The Swiss Federal Report suggests that the route of adoption would be available for the intending mother although no specific cases or examples are provided. Given the prohibition, it is difficult to understand why such an approach would be available not least because of the contradictions with respect to adoption compared with surrogacy.¹⁴⁰

138 See the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by Switzerland at 28 (available at: <www.hcch.net>). It should be noted that this aspect of public policy has not been raised expressly in the (limited) reported case law and doctrine.

139 Swiss Federal Report.

140 Me Odile Pelet, Swiss lawyer: 'La question des enfants nés de mère porteuse flotte dans un vide juridique troublant.', interview on 3 April 2012 on RTS available at: <www.rts.ch/emissions/mise-au-point/2976944-mise-au-point.html>. See also the appeal to the Federal Court discussed at 3.4.3(d).

If adoption is a solution (to provide the intending mother with a parental status), it is questionable whether, in the circumstances of (inter-country) surrogacy, the Swiss law requirements with respect to adoption would be satisfied. For example, a requirement for the purposes of adoption includes the assessment of the parental capabilities of the prospective adopting parents; the lack of such an assessment, as might be case in the context of surrogacy, would, it is submitted, violate Swiss public policy. In Switzerland, there are additional substantive requirements: that only people that have the relevant personal, financial, and educational qualities, along with the prerequisite health and available time, should be considered as prospective adopting parents and that they should ensure that the child receives care, education, and adequate training.¹⁴¹ Where the adoptive parents have children, the views of these children to the adoption must be taken into account. The adoption is pronounced by the competent cantonal authority. The Swiss Federal Council takes the view that this rule (and these conditions) should also apply to surrogacy.¹⁴² The perceived convenience of finding a surrogate mother, drawing up a surrogacy agreement and paying her a sum of money, should not be used to circumvent the conditions of adoption.

3.4.4 Nationality of the child

Switzerland follows the principle of *ius sanguinis*; the principle of *ius soli* is not applicable.¹⁴³ According to Article 1 of the Swiss Naturalisation Act 1952,¹⁴⁴ every child of Swiss descent acquires Swiss nationality at birth. The acquisition is automatic if the parents are married or if the mother of the child has Swiss nationality. If a child is born out of wedlock to a foreign mother, the acquisition of Swiss nationality is based on legitimisation by the Swiss father. If the father recognises his paternity, the child acquires Swiss nationality retrospectively (as from the date of birth). It therefore seems possible for a Swiss genetic intending father to acknowledge his paternity according to Swiss law and pass his nationality by descent.

If the child is born abroad, he or she must be registered with a Swiss authority in or outside of Switzerland and the child has to declare the intention to keep Swiss nationality. If this registration and the declaration are completed before the child is 23 years old, then

¹⁴¹ Article 2(1)(d) Adoption Ordinance (OADO).

¹⁴² Swiss Federal Report at 'Conclusions'.

¹⁴³ See for an overview of the Swiss rules on nationality the country profile submitted to EUDO Citizenship database by A. Achermann *et al.*, last update June 2013 available at: <<http://eudo-citizenship.eu/country-profiles/?country=Switzerland>>. The nationality law in Switzerland is the Loi fédérale du 29 septembre 1952 sur l'acquisition et la perte de la nationalité suisse, SR 141.0 ('Federal Act on the Acquisition and the Loss of Swiss Citizenship 1952').

¹⁴⁴ Available at: <www.admin.ch/ch/e/rs/141_0/index.html>.

Swiss nationality is acquired retrospectively as from birth. Swiss nationality is also automatically transferred when a Swiss national adopts a foreign child.¹⁴⁵ The adopted child acquires the nationality of the adopting parent retrospectively as from birth. Foundlings also acquire Swiss nationality by law.¹⁴⁶ A child of unknown descent found on the territory of Switzerland acquires the citizenship of the canton in which he or she was found and, with that, Swiss nationality.

In practice, if there is no suspicion of surrogacy, the child will receive an entry permit to Switzerland, and the intending parents may return to Switzerland with the child. The Swiss authorities will delegate the supervisory authority to the Canton of the origin of the intending parents or one of the intending parents. Filiation is then entered in the register of civil status. The effects of surrogacy are therefore also relevant for immigration purposes. In one reported decision, a Colombian national resident in Colombia agreed to act as a surrogate for her Swiss resident sister (medically unable to carry a child) and brother-in-law, the genetic father of the child born, who recognised the child.¹⁴⁷ Following the delivery of the child in Colombia and her arrival in Switzerland, the relevant Swiss authorities declared that the surrogate could remain in Switzerland based on the law of family reunification.¹⁴⁸

3.4.5 *Birth registration and records*

The Cantonal civil register authorities are responsible for registering the birth of a child. The registration is based on the notification to the authority within three days of birth.¹⁴⁹

Unlike many other countries, Switzerland does not issue 'birth certificates' per se. Rather, information is entered onto the civil status register, and extracts from the register are issued when they are needed for specific purposes. Where it concerns adoption, the court, upon granting an adoption order, notifies the relevant Cantonal authority that it has approved an adoption before the Cantonal authority is able to register the information about the parents and child in the civil status register.

As the intending parents must both recognise or respectively adopt the child, the fact that the child was born of a surrogate is likely to be documented. Concerning an adoption following surrogacy, assuming the father of the child is acknowledged as the genetic and legal parent, his name will be listed on the register as the legal parent when the Cantonal

145 Article 7 Federal Act on the Acquisition and the Loss of Swiss Citizenship 1952.

146 *Ibid.*, Article 6.

147 Reported by ATS on 9 March 2009, 'Une mère porteuse obtient le droit au regroupement familial', referencing Arrêt 2C_693/2008 du 9 mars 2009.

148 See <www.bfm.admin.ch/content/dam/data/migration/schweiz_-_eu/personenfreizuegigkeit/factsheets/fs-familiennachzug-f.pdf>.

149 Article 35(1) l'Ordonnance sur l'état civil.

authority is first notified of the child's birth. The child's gestational mother would be entered onto the register. When the intending mother's application to adopt the child is approved, her name is entered onto the population register as the child's legal mother but it remains clear that she is also the adoptive mother. The information that the child has another birth mother remains on the register. The child may later access the data if he or she so chooses.

Regardless of how parental status is established, the Swiss Federal Council is of the opinion that the right of the child to know his or her parentage must be protected as much as possible. Therefore, biological and genetic parents, provided that the data are available, must be recorded, regardless of circumstances, whether in a specific case of adoption or recognition of a link of foreign parentage.

3.4.6 *National considerations*

In the words of the Swiss Federal Council,¹⁵⁰ a general refusal to recognise a parent-child relationship regardless of the welfare the child concerned violates the best interests principle endorsed by Article 3(1) CRC; the state has a duty to protect children, and the child should not be held responsible for the fact that he or she was born to a surrogate. A strict assumption that the use of surrogacy violates Swiss public policy cannot therefore be made. Yet, as surrogacy is prohibited not only by a federal act but also by the Constitution, courts and authorities in Switzerland may, in certain undefined circumstances, refuse to recognise a foreign decision or authentic act based on a breach of public policy. It is suggested that Swiss courts and Cantonal and Federal authorities are left to adopt a case-by-case approach although how this applies in practice is yet to be seen. It is questionable whether in this delicate matter, the best interests of the child are served by solutions on a case-by-case basis. What is clear is that Switzerland is experiencing the effects of inter-country surrogacy. In its Questionnaire to the HCCH in 2014, the national reporter noted:

Ultimately the data [on surrogacy] is not reliable. It has to be assumed that there is a high number of unreported cases. If a young couple enters Switzerland with a child born abroad, there is no investigation save in the presence of clear ground to suspect (Birth certificate without a woman or a woman who has obviously exceeded reproductive age). A journal reported that physicians in Ukraine indicated that they treated some 80 couples from Switzerland so far.¹⁵¹

¹⁵⁰ Swiss Federal Report.

¹⁵¹ See the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by Switzerland at 26 (*available at*: <www.hcch.net>).

The Swiss national reporter also identifies the following areas that give cause for concern in these cases¹⁵²:

- a) The uncertainty of the legal status of children born to ISAs [international surrogacy arrangements], in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother: And the physical and social impact! And the risk of social exclusion (India f.e.).
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs: [...]
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.): [...]
- l) Other: The psychological impact of an ISA on the development of the child (Genetic mother, biological mother, intending/legal mother).

Every aspect of commercialised surrogacy is troubling. Surrogate mother, egg cells and child are part of a contract. Surrogate mother and child are therefore objects, not legal subjects. Without regulation everybody can "buy" a child. Once the child is in the custody of the intending parents it is very difficult to undo or heal potential rights violations. Exploitation of surrogate mothers. The child's descent is split (genetic mother/biological mother).

While these comments are insightful, the Federal Council notes that overall, the global situation is unsatisfactory as current legal processes can be detrimental to the child. Weeks or even months may pass until the issue of parental status is correctly configured, and it is therefore possible that Swiss-based intending parents may have to remain abroad until parenthood is established. The effects on the child during this limbo period should not be underestimated.

In its Report, the Swiss Federal Council does not suggest specific domestic legislation to respond to cases of inter-country surrogacy, referring instead to the reports undertaken at an international level, principally those of the Hague Conference and the European Union (discussed in Chapter Four). While the Swiss Federal Report lists a number of issues and concerns with respect to inter-country surrogacy, it is arguably a missed opportunity

¹⁵² *Ibid.*, 31.

in as much as the Federal Council has not suggested the issuance of a good practice guide or other commentary which would be useful to the relevant Cantonal Child Authorities to ensure consistency in approach.

3.5 AUSTRIA

3.5.1 *Overview of domestic approach to surrogacy*

Surrogacy – full or partial, commercial or altruistic – is prohibited under Austrian law.¹⁵³ The Austrian Foreign Ministry has issued the following consular information:

Surrogacy is banned in Austria, § 2 and 3 Reproductive Medicine, Reproductive Medicine Act as amended, Federal Law Gazette 275/1992.

According to § 137b Civil Code the mother of a child is always the woman who gave birth to the child, that is, the surrogate mother - and not the contractor of the surrogacy.

The child of a (foreign) surrogate mother does not acquire Austrian citizenship under § 7 of the Nationality Act 1985 as amended (Federal Law Gazette 311/1985) from the Austrian contractor of the surrogacy.

Under these circumstances the Austrian representative authorities abroad can therefore not provide neither an Austrian proof of citizenship nor an Austrian passport, nor issue an Austrian identity card for the child.¹⁵⁴

3.5.2 *Legal parenthood in the context of surrogacy*

Austrian law does not specifically regulate the consequences of surrogacy in the field of parentage. Accordingly, the regular rules in the field of parentage, parental responsibility and child protection apply in these cases. As considered below, the legal position of a child born as a result of surrogacy is uncertain and dependent upon the parties involved in the surrogacy and their (genetic) relationship with respect to the child.

¹⁵³ Particular attention has been given to the report on Austria in L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States' [2013] European Parliament 100-104.

¹⁵⁴ See <www.bmeia.gv.at/en/embassy/consulate-general-new-york/practical-advice/consular-information/surrogacy.html>.

(a) The grounds for legal maternity

Under Austrian law, there is a legal presumption, according to which the mother is the woman bearing the child.¹⁵⁵ The child can have only one legal mother. Section 3(3) of the Austrian Artificial Procreation Act provides that '[o]va and viable cells may only be used for the woman from whom they originate.'¹⁵⁶ This therefore means that the surrogate is at birth the legal mother of the surrogate-born child.

(b) The grounds for legal paternity or parenthood of the second parent

Under Section 138(1) of the Austrian Civil Code (ABGB), the father of a child is (1) the man married to the birth mother, or her husband deceased not less than 300 days before the birth or (2) the man recognised paternity or (3) the man whose paternity was established by judicial order. Also, according to Section 138(2) ABGB, if several men are concerned, the legal father would be the man married to the mother.

In the context of artificial reproduction, which, as we have seen, is usually of relevance in the context of surrogacy, according to Article I(3) of the Law on Reproductive Medicine: (1) artificial reproductive technologies are only allowed when the sperm and ovum of the married or unmarried couple are used and (2) for artificial insemination of a woman, the use of the sperm of a third person is authorised, provided the husband or the male partner is infertile.¹⁵⁷

3.5.3 *Inter-country surrogacy and private international law on parentage*

(a) Recognition of legal parentage in foreign judgments

In Austria, private international law rules are regulated by the Private International Law Act (adopted in 1978¹⁵⁸ as amended) (IPRG).

Despite the legislative prohibition, the status of children born as a result of inter-country surrogacy has, to date, been considered on at least two occasions by the Austrian Constitutional Court. The first reported case involves an American surrogate (resident in the US State of Georgia) who gave birth to two children whose genetic parents are an Austrian citizen (the intending mother) and an Italian citizen (the intending father (and husband) residing in Vienna.¹⁵⁹ Due to the removal of her uterus, the Austrian intending mother could no longer bear children but could produce ova. The couple looked to a ges-

¹⁵⁵ §137(b), ABGB ((§137(b), Allgemeinen bürgerlichen Gesetzbuch – ABGB (JGS 946/1811) modified by Article II, Fortpflanzungsgesetz – FmedG (BGBl 275/1992)). No indication can rebut this presumption, as ovum donation is illegal.

¹⁵⁶ Federal Law Gazette 275/1992.

¹⁵⁷ Fortpflanzungsgesetz – FmedG (Law on Reproductive Medicine) (BGBl 275/1992).

¹⁵⁸ International Privatrechtsgesetz, BGBl. Nr. 304/1978.

¹⁵⁹ Austrian Constitutional Court B13/11-10, judgment handed down on 14 December 2011. On file with author.

tational American surrogate (the ova of the intending mother and the sperm of the intending father were used). The children were born respectively on 19 August 2006 and 10 April 2009. The children, American citizens by birth in the USA, were recognised as the intending parents' children by American courts. They were subsequently raised by the intending parents and registered as Austrian citizens by the City of Vienna, obtaining Austrian citizenship as a result. When the mother claimed child benefits, the Austrian Ministry of Interior requested the City of Vienna to withdraw the Austrian nationality of the children arguing that surrogacy was illegal under Austrian law, that the surrogate remained the children's mother under Austrian law (irrespective of the genetic relationship) and that the American Court's decision establishing parental status of the Austrian mother could therefore not be recognised.

The Constitutional Court rejected this argument on four grounds. Firstly, it pointed out that the American judgment establishing legal motherhood of the Austrian genetic mother was taken without reference to Austrian law and was valid under norms of private international law. Secondly, the Court rejected the argument that the Austrian law prohibiting surrogacy was part of Austria's public policy thus overriding the American decisions. The Court outlined that the federal law on Assisted Reproductive Technology neither had constitutional status nor protects fundamental rights. The Court held: *'the rules of FMedG are not a component of the Austrian 'Bill of Rights', nor are they guaranteed constitutionally. [...] The ordre public constitutes the underlying principles of Austrian law. Constitutional rights are in this vein crucial. Amongst them is the well-being of the child.'*¹⁶⁰ Thirdly, the Court stated that the American surrogate could not be forced into the position of the legal mother against her will. To paraphrase the words of the Court, it would be in contradiction to the child's best interests to impose the child on the surrogate against her will. These far-reaching and negative consequences are not justified in light of the child's present and future best interests. Lastly, the Court held that the Austrian Ministry of Interior had failed to consult relevant scholarly opinion and case law on public policy and neglected to assess the best interests of the child as a key factor in determining the children's nationality. The intending parents' right to equal treatment by law was infringed.

(b) Recognition of legal parentage in foreign authentic acts

In a second reported decision, twins were born in June 2010 in Ukraine to a Ukrainian resident national surrogate.¹⁶¹ On the birth certificates, two Austrian nationals were named as the parents: Mrs. T. L. as the mother, her husband Mr. P. L. as the father. In order to

¹⁶⁰ 14 December 2011, B 13/11, VfSlg 19.596/2011.

¹⁶¹ Verfassungsgerichtshof, 11.10.2012 – B 99/12 available at: <www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09878989_12B00099_00/JFT_09878989_12B00099_00.pdf>. See C. Koechle, 'Determination of Citizenship after (Supposed) Birth through Full Surrogacy in the Ukraine: Violation of Article 8 ECHR by not Taking into Account the Welfare of the Child' [2013] 7 Vienna Journal on International Constitution 239.

travel to Austria with the children, Mr. P. L. translated the birth certificates into German and arranged for the certificates to be legalised by postille and requested the Embassy of Austria in Kiev to issue Austrian passports. The official at the Embassy suspected that the twins were born to a surrogate, and the Ministry of Interior requested a determination of the parentage and nationality of the children. The couple maintained that they did not engage a surrogate; Mrs. T. L. was inseminated with the sperm of her husband and that she gave birth to these children by caesarean section. The Embassy of Austria in Kiev and the City of Vienna requested evidence from the couple who were unable to mitigate the suspicions (non-disclosure of the name of the Ukrainian hospital; non-disclosure of the identity of the doctor in charge of the medically assisted reproduction procedure; Mrs. T. L.'s refusal to be examined by a doctor from the Embassy; non-disclosure of an individual in Vienna capable of witnessing her pregnancy). By letter dated 7 December 2011, suspecting a surrogacy arrangement, the determination of Austrian nationality was refused on the basis of Article 137 ABGB (the legal mother is the woman who gives birth to the child), Article 3(3) Assisted Reproductive Technology and the incompatibility of surrogacy with Austrian public policy. As a result, Mrs. T. L. was not considered to be the legal mother of the twins and, as such, the twins were not Austrian nationals by descent.

Upon appeal to the Austrian Constitutional Court, the Court found that the scope of protection offered by Article 8 ECHR included the relations of a child with his or her parents. Under this protection of private and family life, the right of a child to a nationality is included, when it is based on the relationship of parentage between the child and his or her parents. The administration did, in this case, apply the dispositions of Austrian law unreasonably and disproportionately, which led to a violation of the respect of the right to a private and a family life of the applicants. According to Article 7 ABGB,¹⁶² a child born of a surrogate has a right to Austrian nationality from his or her birth (for a child born in wedlock – if one of the parents is Austrian; for a natural child – if the mother is Austrian). In this case, there was no doubt that the children had a genetic relation with the intending parents. The doubt arose with respect to the identity of the surrogate. This doubt leads the administration to ignore the verification of the genetic parenthood and to concentrate exclusively on the legal parenthood. Focusing on an incompatibility between Austrian public policy and the fact of recognising the birth certificates, the Constitutional Court held that the administration ignored the rule of law within the Austrian constitutional sphere.

¹⁶² Staatsbürgerschaftsgesetz – StbG, 1985 (BGBl 311/1985, 122/2009).

3.5.4 *Best interests of the child, family life, and public policy*

In both decisions, the best interests of the child are a primary consideration for the Austrian Constitutional Court, which, in broad terms, are understood to mean that the children's longer term best interests are to be raised by the intending parents and not by the surrogate. Moreover, it is also in these children's interests to have Austrian citizenship. It can be observed that while surrogacy is not expressly authorised in Austria, no adoption or other transfer or parenthood procedure was necessary in the above cases as the intending parents were recognised as the legal parents of the children for the purposes of Austrian law.¹⁶³

Public policy comprises fundamental values protected by Austrian law. Constitutional rights (in particular, human rights protected by the ECHR) form part of these values. Article 6 IPRG refers to principles such as autonomy, equal rights, non-discrimination on the basis of origins (of particular relevance to these children) and the protection of the best interests of children.¹⁶⁴ As the Austrian Constitutional Court has already ruled, the dispositions of the Law on Reproductive Medicine are not a part of these fundamental values of Austrian law, and this, including those prohibiting surrogacy, does not belong to the constitutional sphere. The best interests of surrogate-born children are threatened by the non-recognition of foreign birth certificates and/or judgments on parentage.

While Austrian choice of law rules lead in most cases to the application of the Austrian 'birth-motherhood rule', the constitutional protection of private and family life by Article 8 ECHR requires Austrian authorities to recognise the legal family status acquired by a child and the intending parents.

3.5.5 *Nationality of the child*

For the purposes of nationality law, a distinction is made between children born of married parents and those of unmarried parents.¹⁶⁵ In the former case, the child's Austrian citizenship is conferred if either parent is an Austrian national at the time of the child's birth, whereas it can only derive from the mother if she is unmarried at the time of birth. If the father of a child born out of wedlock is an Austrian national, the child receives the

163 B. Lurger, 'The Austrian Choice of Law Rules in Cases of Surrogate Motherhood Abroad – The Best Interest of the Child Between Recognition, European Human Rights and the Austrian Prohibition of Surrogate Motherhood' [2013] *Praxis des Internationalen Privat- und Verfahrensrechts*.

164 IPR (Internationale Privatrecht – IPR Gesetz (BGBl 304/1978, 135/2000); see also L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States' [2013] *European Parliament* 103.

165 See generally Article 7 Federal Law concerning the Austrian Nationality (BGBl 311/1985, 122/2009) (Nationality Act 1985). An unofficial consolidated version in English is available at: <<http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=AT%20Nationality%20Act%201985%20%28consolidated%20version%20as%20by%20Law%2037%202006%29.pdf>>.

nationality of the father upon legitimation.¹⁶⁶ It appears, remarkably, that no citizenship consequences follow adoption.¹⁶⁷

With respect to surrogacy, the decisions of the Austrian Constitutional Court provide a framework to children born through surrogacy abroad; as mentioned above, according to Article 7 Nationality Act¹⁶⁸ as interpreted by the Court, a child born of a surrogate has a right to Austrian nationality from his or her birth (for a child born in wedlock – if one of the parents is Austrian; in other cases – if the mother is Austrian). In light of Article 8 ECHR and considering that the best interests of the child principle is a consideration when balancing conflicting interests, the Court holds that in cases such as the applications before the Court where legal parenthood is to be recognised, authentic, public foreign certificates are to be regarded as relevant evidence for the acquisition of citizenship by descent.

Obviously influenced by the reasoning of the Austrian Constitutional Court, Article 7(3) Nationality Act was amended on 30 July 2013 and provides that citizenship for children born abroad to a surrogate mother who is not an Austrian citizen when the child's intending mother is an Austrian citizen will be granted. A surrogate-born child will acquire citizenship at birth if, according to the law of the country where the child was born, an Austrian citizen is the mother or father of the child and if the child would be stateless unless he or she acquired the Austrian citizenship at birth. The new rule applies only to children born abroad.

3.5.6 *Birth registration and records*

On the basis that there are no specific statutory rules on parentage in the context of surrogacy, the normal rules of legal parenthood apply, in which it would seem that the general rules of birth registration will apply. It would seem that if the intending parents are, by operation of law, the legal parents, then they will be recorded in the relevant birth register. It is unknown whether such register will also record details of the surrogate (birth) mother.

3.5.7 *National considerations*

Koechle maintains that even if the focus of the Constitutional Court's discussion in the reported cases differs, the judgments lend to the conclusion that the consequences of

¹⁶⁶ Articles 7 and 8 Nationality Act 1985 (*Bundesgesetz mit dem das Staatsbürgerschaftsgesetz geändert wird*).

¹⁶⁷ See for an overview of the Austrian rules on nationality the country profile submitted to EUDO Citizenship database by D. Cinar, last update April 2010 available at: <<http://eudo-citizenship.eu/country-profiles/?country=Austria>>.

¹⁶⁸ Nationality Act 1985.

applying the statutory prohibition of surrogacy may conflict with the best interests of the child amounting to a violation of Article 8 ECHR.¹⁶⁹ The Constitutional Court has been ready to interpret, with references to the ECHR and the CRC, the best interests of these children as requiring that a legal parental relationship be established under Austrian law. It must be asked, however, if the judgments are limited to the clear (arguably non-contentious) facts of each case. As Koechle writes, '[w]hether there are (and what kind of) circumstances under which the Constitutional Court may consider that § 137b ABGB does apply to a case where a child has already been born through surrogacy and that its application does not conflict with the principle of the best interest of the child and Article 8 ECHR, remains to be seen.'¹⁷⁰ Finally, an important finding is that neither reported judgment refers expressly to the payments made.¹⁷¹

JURISDICTIONS WHERE SURROGACY IS UNREGULATED

3.6 BELGIUM

3.6.1 Overview of domestic approach to surrogacy¹⁷²

The Embassy of Belgium in Washington, DC, USA, has issued the following statement:

Children born of a surrogate mother

The Belgian ministry of foreign affairs wishes to inform you that Belgian legislation does not deal with the question of surrogacy or of children born of a surrogate mother.

169 C. Koechle, 'Determination of Citizenship after (Supposed) Birth through Full Surrogacy in the Ukraine: Violation of Article 8 ECHR by Not Taking Into Account the Welfare of the Child' [2013] 7 Vienna Journal on International Constitutional Law 239-244, 243.

170 *Ibid.*, 244.

171 This of course does not mean that the national authorities did not consider the likely commercial aspects.

172 The author is grateful to and acknowledges his discussions with Jinske Verhellen of the University of Ghent and her review of a draft of this sub-chapter, as well as Verhellen's and Verschelden's presentation at the Aberdeen Workshop, which included a helpful overview of some of the Belgian case law referred to in this sub-chapter and their 'National Report on Belgium' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013). Particular attention has been given to the country report on Belgium in L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States' [2013] European Parliament 206-233; and to the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by Belgium (available at: <www.hcch.net>). See also C. Henricot, 'La gestation pour autrui en droit privé international' in F. Monéger, *Gestation pour autrui: Surrogate Motherhood* (Paris Collection colloques, Volume 14, 2011) 49 and the CIEC Report on Surrogacy.

Faced with this legislative void, our services are not in a position to recognize the effects of any foreign documents provided in this context (birth certificate, contract...) this position is taken even if the local legal procedure has been scrupulously followed. That which has effect abroad, in the case in point is not valid in our internal legal system.

If a Belgian citizen decides to arrange for a surrogate maternity in the United States, even if the case arises in compliance with local law, *there is no guarantee that his paternity/maternity will be recognized under Belgian law, nor that the child will be provided with a travel document.*

The services of the Federal Public Service Foreign Affairs will refuse to recognize his full right of paternity/ maternity will provide no travel document and will invite him to apply to the court of first authority (See articles 23 and 27 of the Belgian code of international private law).

In light of what precedes and with the difficulties with which a Belgian national who has chosen to arrange for surrogacy or a surrogate mother, *we would like to remind you that adoption is provided for by Belgian law and therefore constitutes a possible alternative.* [Emphasis added, MWG]¹⁷³

The warning of the Belgian Embassy is clear: there is no express provision in Belgian law for surrogacy and there is no guarantee that the legal status between the intending parents and the surrogate-born child will be recognised or established under Belgian law. While there is no specific legislative act on surrogacy, the Belgian Act of 6 July 2007 concerning medically assisted reproduction and the use of embryos and gametes, which does not regulate surrogacy, would apply where artificial procreation techniques are used in the execution of a surrogacy and, as such, it is argued that the requirements of this Act should be respected.¹⁷⁴ Article 6 Belgian *Civil Code* ('Belgian Civil Code')¹⁷⁵ prohibits any deviation by private agreement from the laws which relate to public order and decency, and Article 1128 Belgian *Civil Code*¹⁷⁶ provides that only objects of contracts can be the subject of agreement, which is not the case for gametes, embryos, children, or the reproductive functions of a woman. As has been observed with respect to France, in Belgium, the illicit

173 Statement available at: <www.diplobel.us/BelgianCitizens/Nationality/surrogatemother.asp>. See also the warning at: <http://diplomatie.belgium.be/en/Newsroom/news/press_releases/foreign_affairs/2011/02/ni_1802110_vanackere_surrogate_motherhood.jsp>.

174 Chamber of Representatives 2010-2011, 20 June 2011 COM 268.

175 The Belgian Civil Code (*Code civil* or *Burgerlijk Wetboek*) is available at: <www.droitbelge.be/codes.asp#civ>.

176 Article 6 Belgian Civil Code reads: 'On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs' (laws relating to public policy and morals may not be derogated from by private agreements); Article 1128 Belgian Civil Code reads: '[i]l n'y a que les choses qui sont dans le commerce qui puissent être l'objet des conventions' (only matters which may be the subject matter of legal transactions between private individuals may be the object of agreements).

nature of surrogacy is based on a number of considerations: lack of free and informed consent on the part of the surrogate and the contravention of the public policy principles of the inalienability of the human body and of personal status.¹⁷⁷

Despite these legislative provisions and Consular notices, the Belgian courts have had cause to consider the effects of surrogacy in its legal order on a number of occasions. Although it is understood that there are many more reported judgments and instances of surrogacy, Verhellen observed in 2013 that six reported cases dealt with surrogacy cases taking place abroad (three in the Ukraine, two in India, and one in California, USA) and two dealt with surrogacy cases in Belgium between a Belgian surrogate and foreign intending parents.¹⁷⁸ While the case law suggests that surrogacy contravenes Articles 6 and 1128 Belgian Civil Code, the approach of the Belgian courts is more nuanced than a strict reading of these legislative provisions suggests, with courts providing for certain effects following the surrogacy (principally in terms of parenthood and nationality). The picture presented is more accommodating in approach than that articulated by the Belgian Embassy above.

At the national level, it is for fertility centres in Belgium to decide whether to provide surrogacy services. It is reported that there are three fertility centres that perform surrogacy: the hospital 'La Citadelle de Liège' in Liège, Ghent University hospital and the hospital 'Saint-Pierre' in Brussels.¹⁷⁹ It is understood that both the surrogate and the intending parents have to fulfil certain requirements and are subject to a strict selection process before they are considered eligible. This *'includes in-depth medical examination of the intended and surrogate mother as well as consultations with a psychologist. Cases are discussed with the hospital fertility team and with an ethics committee.'*¹⁸⁰ It has also been noted that:

Surrogacy remains the last resort and conditions are very strict. Out of about 25 requests per year on average, only three or four are accepted at La Citadelle. Foreign patients may only be included if they speak French to allow for thorough follow-up and counselling by psychologists and lawyers. Ghent University Hospital only accepts requests where the 'role of the surrogate mother is purely gestational, and the child is genetically related to both desiring

177 See the comments set out in the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements submitted by Belgium (*available at*: <www.hcch.net>), 22-23.

178 J. Verhellen, 'Inter-Country Surrogacy: A Comment on Recent Belgian Cases' [2011] *Nederland's International Privaatrecht* 657-662.

179 S. Bourguignon, 'Chaque année en Belgique, une cinquantaine de personnes prennent des risques pour assouvir leurs désirs d'avoir un enfant à tout prix', *Le Soir* 4 October 2011 *available at* <http://archives.lesoir.be/-amorce-chaque-annee-amorce-en-belgique-une-cinquantain_t-20111004-01LTEX.html>.

180 T. Rabesandratana, 'The middle-moms', *Flander's Today* 27 October 2010 *available at*: <www.flanderstoday.eu/content/middle-moms>.

parents' and only if the intended parents provide the surrogate themselves. The hospital received 21 such requests between 2004 and 2007; six were given the green light.

The main reasons for refusing treatment were psychological, such as an unstable relationship between the people involved or dubious intentions of the surrogate, such as financial benefits.¹⁸¹

In most cases, the intending parents will also have to find a surrogate (aged between 35 and 45). The age limit was introduced in 2007.¹⁸² It has been observed that this requirement makes it '*more difficult for the intend[ing] parents to find a suitable and reliable surrogate mother.*'¹⁸³ Only altruistic surrogacy is practised, albeit there are no known regulations with respect to remuneration or compensation for the surrogate (and her family).¹⁸⁴

3.6.2 *Parenthood in the context of surrogacy*

Belgian law does not specifically regulate the consequences of surrogacy in the field of parentage. Accordingly, the rules of parentage, parental responsibility and child protection apply.¹⁸⁵

(a) **The grounds for legal maternity**

Under Belgian law, the woman who (i) gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother, or, broadly speaking, (ii) she is, at the moment of birth of the child, married to or is in a registered partnership with the woman who has given birth to the child conceived through artificial donor insemination.¹⁸⁶ In most cases, the surrogate is the legal mother by dint of birth and the child has only one legal mother. As a result, the intending mother has no legal relationship with the child at birth even if she is genetically related to the child.

¹⁸¹ *Ibid.*

¹⁸² I. Stuyver and I. De Sutter, 'A Five-year Experience With Gestational Surrogacy and the Impact of Legal Changes' [2010] Human Reproduction 12.

¹⁸³ *Ibid.*

¹⁸⁴ This topic of payment was considered by a court in Ghent (15 ch.), 30 April 2012. This was a case of traditional surrogacy. During pregnancy, the intended parents paid to the surrogate a monthly amount of EUR 1,600. The father then acknowledged the child but the request for full adoption by the intended mother was refused because of the payments made by the intended parents. This was considered as a buying agreement; making the adoption *per se* illegal.

¹⁸⁵ See the detailed responses to the questions on legal parentage prepared by the Belgian national reporter to the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (*available at*: <www.hcch.net>), 8-10.

¹⁸⁶ Article 312 Belgian Civil Code. See also Act voted on 23 April 2014, 53K3532, *available at* <www.dekamer.be> on 17 June 2014.

Belgian law provides that if the name of the woman who gave birth to the child is not mentioned in the birth certificate, motherhood may be established through recognition¹⁸⁷ by any woman subject to the approval of the parent with respect to whom affiliation has already been established¹⁸⁸ and public policy considerations. The availability of this route to legal motherhood for the intending mother is limited by public policy considerations (discussed below). Otherwise, the intending mother would need to consider an application for adoption to achieve the status of legal mother provided the conditions for adoption can be met.

(b) The grounds for legal paternity or parenthood of the second parent

If a child is born at a time when the surrogate is married or within 300 days from the dissolution or nullification of her marriage, the surrogate's husband is treated as the legal father.¹⁸⁹ The legal paternity of her husband is established automatically. A claim contesting the husband's paternity is possible.¹⁹⁰

If the surrogate is an unmarried woman or in a same-sex registered partnership, the child is not automatically assigned a father by operation of law. It is possible, however, for any man to recognise the child or establish paternity through judicial procedure (pre- or post-birth recognition). Broadly speaking, if the surrogate is unmarried, the intending genetic father can acknowledge the child, which allows him to establish parentage without engaging in an adoption procedure.¹⁹¹

Any man can recognise a child to whom an unmarried mother has given birth¹⁹² or is yet to give birth on condition that pre-birth recognition takes place after the conception of the child,¹⁹³ subject to the consent of the mother.¹⁹⁴ The Registrar will request that a medical certificate is submitted, which confirms that the (surrogate) mother was pregnant for at least six months. This is because no certificate of civil status can be drawn up for a foetus less than 180 days old.¹⁹⁵

Whenever a married man recognises a child conceived with a woman to whom he is not married, this recognition must be notified to his (male or female) spouse or registered

187 Article 313 Belgian Civil Code.

188 Article 329bis Belgian Civil Code. This would, more particularly, require the approval of the man who has recognised the child prior to its birth; however, such maternal recognition does not require the consent of the husband of the woman who recognises the child.

189 Article 315 Belgian Civil Code.

190 Article 318(4) Belgian Civil Code.

191 Articles 319 and 329bis Belgian Civil Code.

192 Article 319 Belgian Civil Code.

193 Article 328 Belgian Civil Code.

194 Article 329bis(2) Belgian Civil Code.

195 Circulaire n. 42 dd 22 mars 1849 du Ministre d l'Intérieur concernant L'inhumation des mornes; Bulletin Du Ministère de l'Intérieur 1849, 135.

partner, depending on whether or not the certificate of recognition was drawn up in Belgium.¹⁹⁶

(c) Domestic cases of surrogacy

In order to establish a legal parental relationship with the child, intending parents seeking to establish parentage can consider adoption, undertaken by the intending mother¹⁹⁷ or by both of the intending parents,¹⁹⁸ or a procedure of approval of the acknowledgement of paternity by the intending father.¹⁹⁹

Belgium provides for adoption by a single parent as well as by same-sex persons and cohabitees (who, in the case of the latter, have made a declaration of legal cohabitation or of permanent and affective life together for at least the last three years when the adoption request takes place).²⁰⁰ The intending (non-genetically related) father will have to either engage in an adoption procedure to establish parentage to the child or contest the paternal parentage of the husband of the surrogate to establish his own paternity. A selection of domestic decisions relating to surrogacy follows.²⁰¹

In two reported decisions,²⁰² Belgian Courts have had to consider the acknowledgement of paternity of two intending fathers. In both cases, the surrogacy took place with the gametes of the intending parents and the surrogate was not genetically related to the children. Both Courts had to consider the act of acknowledgement made by the intending fathers. This action was founded on the then applicable Article 319*bis* Belgian Civil Code, according to which ‘*if the father is married and acknowledges a child conceived by a woman who is not his spouse, the act of acknowledgement has to be presented through a request of approval before the tribunal of first instance where the child is domiciled.*’ The Courts had to determine if the words ‘*child conceived by a woman who is not his spouse*’ distinguished between different modes of conception. The Courts considered that the surrogate could equally ‘conceive’ a child even if she was not the genetic mother and the acknowledgements

196 G. Verschelden and J. Verhellen, ‘National Report on Belgium’ in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), 67.

197 Youth Court Brussels, 4 June 1996, Case law de Liège, Mons et Brussels, 1996, 1182; Antwerp (16th ch. bis), 14 January 2008, Rechtskundig Weekblad, 2007-2008, 1774; Youth Court Brussels, 6 May 2009, J.L.M.B., 2009, 1083; Ghent (15th ch.), 30 April 2012, Tijdschrift voor Belgisch Burgelijk Recht, 2012, 261.

198 Ghent (15th ch.), 16 January 1989, T.G.R., 1989, 52; Youth Court Turnhout, 4 October 2000.

199 Brussels (3rd ch.), 1 March 2007, Revue trimestrielle de droit familial, 2007, 754 et Civ. Hasselt (1st ch.), 27 March 2001, Limb. Rechtsl., 2001, 323.

200 Article 343 Belgian Civil Code.

201 For a thorough overview and summary of the Belgian cases, see J. Verhellen ‘Inter-Country Surrogacy: A Comment on Recent Belgian Cases’ [2011] *Nederlands International Privaatrecht* 657-662; Verhellen and Verschelden’s ‘National Report on Belgium’ in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013).

202 Brussels (3rd ch.), 1 March 2007. Civ. Hasselt (1st ch.), 27 March 2001 in which the child was born through anonymous childbirth in France (‘accouchement sous x’; see Chapter Three at 3.3).

of paternity were valid. A procedure of approval of full adoption was then introduced by the intending mothers, who were both equally the genetic mothers.

In one reported case, the Belgian surrogate was inseminated with the sperm of the intending father and was also the genetic mother of the child.²⁰³ In addition to the costs associated with the pregnancy, the intending parents paid the surrogate a monthly fee of Euro 1,600. Upon birth of the child, the intending mother sought the approval of her request for adoption. At first instance, the Youth Court of Bruges considered the application within the framework of an adoption procedure and considered a review of the content, scope, and the illegality of the purported surrogacy agreement to be unnecessary. The adoption was granted. Upon appeal, the Court of Ghent in 2012 overturned the adoption order on the basis that the actions of the intending mother amounted to buying a child, which meant that the circumstances were not in full satisfaction of the domestic law on adoption.²⁰⁴ The legal parental status of the intending mother is unknown.

In a 2009 decision, the Youth Court of Brussels considered surrogacy involving a Belgian surrogate unrelated to Belgian intending parents whose gametes were implanted through IVF. The parentage of the intending father was established by the intending father's acknowledgement of paternity. The Court was asked to consider the intending (genetic) mother's application for second parent adoption. The Court granted the adoption on the basis that it was in accordance with the best interests of the child and reflected the reality that the intending mother was considered by all parties as the child's mother.²⁰⁵ Interestingly, no reference to any payment to the surrogate is made, and it should be noted, in contrast to the position in the abovementioned decision of the Court of Ghent in 2012, that the surrogate was not genetically related to the child.

The Belgian Courts have considered an action contesting paternity brought by the husband of a surrogate who claimed he had not consented to the insemination of his wife by the intending father.²⁰⁶ The surrogate was the genetic mother of the child. Paternal parentage was established in relation to her husband, in accordance with the presumption of paternity. In the absence of consent from the husband to the artificial insemination of his wife as well as the absence of a genetic relationship between the husband and the child, the Court held in favour of the husband such that the presumption of paternity was rebutted and displaced.²⁰⁷

Two particular cases have emphasised the risks of the legislative legal vacuum.

203 Ghent (15th ch.), 30 April 2012.

204 Article 351 Belgian Civil Code provides: 'Lorsqu'il résulte d'indices suffisants qu'une adoption a été établie à la suite d'un enlèvement, d'une vente ou d'une traite d'enfant, et seulement en ce cas, la révision du jugement prononçant cette adoption est poursuivie, à l'égard de l'adoptant ou des adoptants, par le ministère public.'

205 Youth Court Brussels, 6 May 2009, Case law de Liège, Moins et Bruxelles 2009, 1083 and *Revue trimestrielle de droit familial* 2011, 172.

206 Civ. Ghent (3rd ch.), 31 May 2001.

207 *Revue générale de droit civil*, 2002, 27.

Baby J was born in Ghent in July 2008.²⁰⁸ After falsifying the hospital's admission records (the Belgian surrogate posed as a Dutch woman), the Dutch intending father registered the birth at the Ghent Civil Registry.²⁰⁹ The child then lived in the Netherlands for several months with the Dutch intending parents. When the falsified statements emerged, a criminal investigation followed. The child was initially taken into care under guardianship of the Dutch child welfare system and was then placed in a Belgian foster home. The surrogate asked a Belgian court to rule that she was the mother of the child and not the Dutch woman and, therefore, that the Dutch woman's husband was not the child's legal father. The Ghent Court of First Instance examined whether a Belgian court had jurisdiction to hear this (cross-border) case, and jurisdiction was held on the basis of the child's habitual residence in Belgium.²¹⁰ The judge then examined the applicable law: Should the request to contest maternity/paternity be determined according to Belgian or Dutch law? The judge found Dutch law to be applicable. According to Article 1:209 of the Dutch Civil Code (at that time),²¹¹ parentage as stated in the birth certificate cannot be contested if the facts as set out in the birth certificate confirm the person's status. The judge ruled that this was not the case for Baby J; the child only lived with the Dutch married couple for a few months, after which he was removed and placed in a foster home. The surrogate could therefore contest the maternity and paternity.

The records of the criminal investigation showed that it was the Belgian woman who gave birth to the child and that false information was given to the hospital. Moreover, the criminal records also showed that all parties involved (the Belgian woman and her boyfriend as well as the Dutch married couple) acknowledged that Baby J was born to the Belgian woman. The Court accepted the contestation of maternity in favour of the surrogate. By holding in favour of the surrogate and establishing her maternal parentage, the Court also nullified the paternal parentage of the intending father that had been established. Before the Dutch Courts, the Dutch couple were convicted of forgery and illegal adoption.²¹² The surrogate and her partner were also the subject of a criminal conviction before the Belgian courts of degrading treatment of a child who found both parties guilty of substitution of a child through a commercial exchange, a situation that the Court considered as the sale of a child as well as a commercial surrogacy, both contrary to the child's human dignity and Belgian public policy.²¹³ The correctional Court of Ghent convicted the surrogate and

208 Ghent (15th ch.), 18 May 2009, 2009/JZ/39.

209 It is noted in the judgment that the surrogate was admitted to hospital under the name of the intending mother.

210 Article 61(1) PIL Code.

211 English Translation *available at*: <www.dutchcivillaw.com/legislation/dcctitle00111.htm>.

212 Rechtbank Zwolle, 14 July 2011, LJN: BR1608 (sentence convicting the woman) et LJN: BR1615 (sentence convicting the man).

213 Article 417*bis* Belgian Criminal Code.

her partner to a year of suspended imprisonment, imposed a fine of Euro 550 and an amount of Euro 7,500 to be paid to the child as damages.²¹⁴

In one case,²¹⁵ the surrogacy took place in Belgium with a Belgian surrogate and Belgian intending parents for an alleged fee of Euro 8,000. Following the deterioration of the relationship between the surrogate and the intending parents, the surrogate informed the Belgian intending parents that she had miscarried but instead engaged with a Dutch couple to whom she handed over the baby. It was reported by the media that the surrogate sold the baby girl to the Dutch couple for Euro 15,000.²¹⁶ Various proceedings commenced (first in Belgium, second in the Netherlands). DNA testing established the Belgian intending father as the child's genetic father. At first instance, the relevant Belgian Court placed the child under the temporary care of the social service of the Flemish Community after requesting the Youth Court of Utrecht (Netherlands) to transfer the case to it.²¹⁷

(d) Inter-country surrogacy and private international law on parentage

From a review of the case law and practice, it can be concluded that the Belgian legal order is confronted with inter-country surrogacy in two particular ways.²¹⁸ First, intending parents of a child born abroad apply for a Belgian passport for the child at the Belgian consulate or diplomatic post of the country where the child is born. This application requires the determination of the child's parentage and, as a consequence, his or her nationality. The child will only be recognised as a Belgian national and therefore entitled to a Belgian passport if the parentage of (one of) the Belgian intending parents is confirmed. In PIL terms, this comes down to the question in practice of whether the foreign birth certificates and/or parental judgments can be recognised. Second, children arrive in Belgium (e.g., with a foreign passport and, if necessary, visa entry clearance) and the intending parents request the local authority to register the foreign birth certificate in the civil registry. This request also implies a PIL review.

(e) Conflict of law rules

In the absence of express regulation of parentage rules in the context of surrogacy or the status of children born abroad by means of a surrogate, reference is made to the Belgian Code of Private International Law ('PIL Code'),²¹⁹ which rules on international issues

²¹⁴ Corr. Ghent, 14 May 2012.

²¹⁵ Court of Appeal of Ghent, 5 September 2005.

²¹⁶ 'Belgium probes baby internet sale' 25 May 2005 available at: <<http://news.bbc.co.uk/2/hi/europe/4578497.stm>>.

²¹⁷ It is understood that the child remains with the Dutch couple although criminal proceedings are pending against the surrogate, the Belgian intending parents, and the Dutch couple.

²¹⁸ J. Verhellen, 'Inter-Country Surrogacy: a Comment on Recent Belgian Cases' [2011] *Nederlands Internationaal Privaatrecht* 657-662.

²¹⁹ Law of 16 July 2004; English translation available at: <www.ipr.be/data/B.WbIPR%5BEN%5D.pdf>.

concerning the establishment of parentage and the recognition of authentic foreign acts (including birth certificates) and foreign judgments.

Article 61 PIL Code provides that the Belgian courts have jurisdiction to hear any action regarding the establishment (or contestation) of parentage if the child has his habitual residence in Belgium when the action is introduced, the person whose parenthood is invoked has his habitual residence in Belgium when the action is introduced or the child and the person whose parenthood is invoked have Belgian nationality when the action is introduced. This means that the Belgian court has broad jurisdiction to hear inter-country surrogacy cases.

It is important to note that there are conflict rules with respect to the establishment of filiation to a child born abroad. When a Belgian court is seised with jurisdiction, Article 62(1) PIL Code provides that the establishment of filiation is governed by the law of the state of the person's nationality upon the birth of the child or, if the establishment results from a voluntary act, at the time such act is carried out. This means that, as considered below, Belgian law could be designated by the application of Article 62 in matters of parentage. Note that if the designation is to foreign law, Article 21 PIL Code provides that the application of a disposition of foreign law is discarded to the extent that it would produce an effect manifestly incompatible with *ordre public*. The Belgian *ordre public* exception is defined in a classical way but adds elements to be taken into account when applying the exception to an individual case. This '*[in] determining the incompatibility, special consideration is given to the degree in which the situation is connected with the Belgian legal order and to the significance of the consequences produced by the application of foreign law.*' This recognises the judge's discretion when applying the exception, but it requires the evaluation of the incompatibility of the foreign law *in concreto* and an evaluation of the proximity of the subject matter with the Belgian legal order.

The cross-border aspect of surrogacy triggers the application of rules of PIL, which leads Belgian courts to apply their conflict rules or of transposing or characterising into the Belgian legal order parentage established abroad. The transposition into the Belgian legal order of parentage established abroad depends on whether the question the court is asked to consider is to recognise a birth certificate established following a case of surrogacy or to recognise a judgment establishing parentage.

(f) Recognition of legal parentage in foreign judgments

When parentage in favour of the intending parents is established as a result of a judgment, the seised Belgian court (or any national authority) has to verify the absence of a basis for refusal in conformity with the rules provided by Articles 22 and 25 PIL Code.²²⁰ Article 22

²²⁰ Article 22(1): 'A foreign judicial decision is recognised in Belgium, fully or partially, without it being necessary to engage the procedure provided for by article 23' and Article 25: § 1st. 'A foreign judicial decision is not

provides, in broad terms, that a foreign judgment is recognised in Belgium, fully or partially, without it being necessary to engage any particular procedure subject to the Article 25 grounds for non-refusal, which includes, among others, a public policy exception. These articles could apply if the parentage of the intending parents results from a pre-birth judgment, as it is the case in Greece as well as in the US State of California, or a post-birth judgment, as is the case in the UK.

A case considered by the Belgian courts that would have required for the application of rules on the recognition of foreign judgments is the Belgian-Californian case.²²¹ Yet, in the case, the Court before which the action was undertaken preferred to reason on the basis of the recognition of the birth certificates delivered following the Californian pre-birth parental judgment, which triggered the application of the rule of conflict of laws in matters of parentage (Article 62 PIL Code). The genetic father being a Belgian national, the judge recognised the Californian birth certificate, after verifying that the paternal filiation could be established in accordance with Belgian law of parentage. The Court concluded that the illegality of the surrogacy contract cannot jeopardise the best interests of the children; for the Court, this was a reason to substantiate the recognition of parentage in relation to the genetic father. The second intending parent initiated adoption proceedings. The Court of the Huy found that the children had, since birth, been part of the family of the intending parents, that family life was established and granted the adoption.

(g) Recognition of legal parentage in foreign authentic acts

The PIL Code also resolves the matter of the recognition of authentic foreign acts, including birth certificates. Recognition of an authentic act does not automatically mean that its content is acceptable. Article 27(1) PIL Code provides that an authentic foreign birth certificate is recognised in Belgium by all authorities, without the necessity for recourse to any procedure, provided the certificate's validity is established in accordance with applicable law, taking into account in particular Articles 18 and 21 PIL Code (evasion of

recognised or declared enforceable if: 1° the effect of the recognition or the declaration of enforceability is incompatible with the public order; this incompatibility is considered taking into account, namely, the intensity of similarity of the situation with the Belgium legal order and the gravity of the effect produced; 2° the rights of defence have been violated; 3° the decision was obtained, in a way such that the persons do not dispose freely of their rights, only to escape the application of the law specified by this law; 4° without prejudice to article 23, § 4, it can still be the subject of an ordinary proceeding based on the law of the state where it was issued 5° it is irreconcilable with a decision issued in Belgium or with a decision issued before abroad and susceptible to be recognised in Belgium; 6° the request was introduced abroad after the introduction in Belgium of a request, still unresolved, by the same parties and with the same object; 7° the Belgian courts were the only competent to settle the question; 8° the competence of the foreign court was based only on the presence of the defendant or on goods without direct relation to the dispute in the state to which the court is attached to; or 9° the recognition or the declaration of the enforceability clashes with one of the basis of refusal foreseen by articles 39, 57, 72, 95, 115 et 121.'

221 Liège, 6 September 2010.

the law and public policy exception (considered below)). The certificate must incorporate the necessary conditions for its authenticity according to the law of the state in which it was issued. Article 24 PIL Code (documents to be produced by the party requesting recognition) may also be applicable. When the authority refuses to recognise the validity of the certificate, an appeal can be made to the relevant district court.

When it comes to actions undertaken to obtain the recognition of birth certificates, an important finding is that the Courts do not recognise these as birth certificates per se (on the basis that these certificates interfere with the '*mater semper certa est*' principle as they usually record the name of the intending mother as mother (or parent) or do not indicate any name, which is contrary to Belgian law and public policy according to which the name of the woman giving birth has to be cited in the birth certificate) but as authentic and legally valid acts, from which results the recognition of the paternity in relation to the child born from the surrogate.²²² It must be stressed, however, that the courts, to date, have refused to consider that a foreign birth certificate could establish the maternal parentage of the intending mother when her name is cited, as is the case in Ukrainian law, in place of the surrogate.²²³ It was also believed that double paternal filiation at birth with regard to the spouse or partner of the intending father,²²⁴ as Californian law, for example, allows, ran contrary to public policy, but a 2014 decision suggests otherwise.²²⁵

To determine whether a person is the mother or father of a child, Article 62 PIL Code requires the application of the law of the state of that person's nationality. In the case of the twins *Hanne and Elke* (Antwerp)²²⁶ and the case of the child *Samuel*,²²⁷ the judges were confronted with Ukrainian birth certificates.

In the matter of *Hanne and Elke*, the surrogacy took place in Ukraine between a Ukrainian surrogate and heterosexual Belgian intending parents. The intending parents were also the genetic parents of the children. The birth certificates named the intending parents as the legal parents of the children. Following the births, the Embassy of Belgium in Kiev refused to acknowledge the birth certificates and refused to deliver passports to the children in order to allow them to travel to Belgium. The intending parents brought proceedings on the basis of Articles 23 and 27 PIL Code so as to request the recognition of the birth certificates. The relevant Court acknowledged the certificates but not as birth certificates (on the basis that the reference to the intending mother in the Ukrainian birth

222 However, the isolated decision given by the First Court in Brussels on 18 December 2012 where the Court refused to recognise the Indian birth certificate on the grounds that, in its opinion, Belgian law would not have allowed the establishment of the intending father's parentage.

223 Civ. Antwerp, 19 December 2008.

224 Liège, 6 September 2010 [2010] 4 Revue trimestrielle de droit familial 1139.

225 Nederlandstalige rechtbank van eerste aanleg Brussels 2012/5418/B. The author acknowledges J. Verhellen for this reference.

226 Civ. Antwerp, 19 December 2008 and Youth Court Antwerp, 22 April 2010: case *Hanne and Elke*.

227 Civ. Brussels, 15 February 2011.

certificate was contrary to Belgian law) but as authentic certificates from which the paternity of the genetic father, also the intending father of the surrogate-born children, was acknowledged. The maternal parentage of the intending mother was not acknowledged. Following the judgment, the intending mother brought adoption proceedings before the relevant Youth Court. The Court granted the adoption based on the best interests of the children such that it was in their best interest to have the parentage with their intending (genetic) mother established. The Court noted that the absence of an adoption order would only serve to penalise the children who did not choose the way they were born. The Court also considered that the case did not involve coercion, exploitation, or fraud (in Belgium or in Ukraine).²²⁸

In the case of *Samuel*, the surrogacy took place in Ukraine between a Ukrainian surrogate and a homosexual married couple, a Belgian national and a French national both residing in France.²²⁹ The genetic father was the Belgian national. The facts cited by the Court do not confirm whether the surrogate was also the genetic mother of the child. The birth certificate named the surrogate as the mother of the child and the Belgian national as the father. A Ukrainian court judgment confirmed that the surrogate refused to assume parental responsibility for the child and thus removed her of parentage in favour of the intending father. The Embassy of Belgium in Kiev refused to recognise the birth certificate and refused to deliver the necessary travel documents for the child. The intending father brought proceedings to request the issuance of a passport to the child. Ruling in the interim, the Court refused to settle in favour of the applicant considering that:

Ordering the Belgian state to deliver the child a passport, with an eventual visa, would equate to recognise the parentage of the applicant to Samuel as well as the Belgian nationality of the child as a passport cannot be delivered by the Belgian State to anyone but a Belgian citizen. The decision would be, thus, declarative of the rights invoked and exceeding the provisory nature of the ruling.²³⁰

A second interim procedure was undertaken. Upon application, the intending father applied to have the birth certificate recognised by the Belgian authorities (Articles 23 and 27 PIL Code). The Court acknowledged the act as an authentic and legally valid certificate which resulted in the paternal parentage of the applicant to the child. The Court considered that the parentage of the intending father was established, as the conditions of Article 329*bis* Belgian Civil Code, on the acknowledgement of paternity, were fulfilled. Following

²²⁸ See also comments on the judgment set out in L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States', European Parliament (2013), 218-219.

²²⁹ *Ibid.*, 90.

²³⁰ Civ. Brussels (interim), 4 February 2010, RR 09/1694/C.

the decision, the Ministry of Foreign Affairs indicated that a Belgian passport would be delivered to the child, allowing him to join his intending father.²³¹ In February 2011, two years and three months after his birth, Samuel was permitted to travel to Belgium with his parents.²³² It should be noted that the Brussels judge seems to refer to the abduction of Samuel ('*the unfortunate and even unlawful attempt by the claimant to fetch the child from Ukraine*') but immediately adds that this is not an element that has to be taken into account when reviewing the legal validity and lawfulness of the birth certificate.

The Belgian-Californian case of *Maia and Maureen*²³³ considered the application of the rules of recognition. In that case, the surrogacy took place in California with an American national resident surrogate and Belgian intending parents. The same-sex Belgian couple married in 2004 and turned to a US surrogacy agency. Twins Maia and Maureen were born in California, and one of the two intending parents was the genetic father. Prior to the birth, a Californian Court by way of a judgment declared both men to be the legal parents of the twins. This judgment required the hospital to indicate the two men as parents on the birth certificates. Following the birth of the twins, the couple returned to Belgium and asked the Belgian local authority to register the birth certificates in the civil registry. The public prosecutor opposed the registration. The couple then instituted legal proceedings for the recognition of the Californian birth certificates. The action concerned the recognition of the birth certificates established in California (Articles 23 and 27 PIL Code). At first instance, the Court refused to find in favour of the applicants, considering that the recognition of the birth certificates would be contrary to Belgian *ordre public* and that by travelling to the USA to engage in a surrogacy arrangement²³⁴ and thus bypass principles of Belgian law, the intending parents committed a fraudulent evasion of the law. It should be noted that the Court focused its ruling on one specific requirement of Article 27 PIL Code, i.e., public policy, referring only briefly to the issue of *fraus legis*. On appeal, in conformity with Article 27 PIL Code, the Court considered the validity of the birth certificates under Belgian law, as designated by Article 62 PIL Code, the law of the nationality of the intending father trying to establish parentage.

The Court considered that the parentage of the intending genetic father was established, as the conditions of Article 329*bis* Belgian Civil Code, on the acknowledgement of paternity, were satisfied. In relation to his spouse, no parentage could be established as Belgian law

231 See 'Samuel aura un passeport belge', 19 February 2011 available at: <www.lalibre.be/actu/belgique/article/643798/samuel-aura-un-passeport-belge.html>.

232 See D. Melvin, 'Boy Stuck 2 Years in Ukraine Arrives in Belgium' *nbcnews.com* 26 February 2011 available at: <www.msnbc.msn.com/id/41800437/ns/world_news-wonderful_world/t/boy-stuck-years-ukraine-arrives-belgium/#.UGNYZY7LCs9>.

233 Liège, 6 September 2010, Civ. Huy, 22 March 2010 and Youth Court Huy (11th ch.), 22 December 2011.

234 The Court held that the surrogacy agreement in that case was against the public policy in Belgium based on the fact that it is against the right of the child to know his or her origin as per Article 7 CRC and because of the commercial element in the contract that is against human dignity protected under Article 3 ECHR.

did not provide for dual paternal parentage at birth. The Court concluded that the illegality of the surrogacy agreement could not prejudice the best interests of the children, a reason to substantiate the recognition of parentage in relation to the genetic father. The second intending parent initiated adoption proceedings. The Court of the Huy found that the children had, since birth, been part of the family of the intending parents and granted the adoption.

In case C,²³⁵ surrogacy took place in India with an Indian surrogate and a Belgian national male; the man was the genetic father of the child. The surrogacy took place through an IVF process with an anonymous egg donation. Parentage by the intending father was established in India by an act of acknowledgement before a notary. The birth certificate did not name the surrogate; only the name of the intending father was recorded. The intending father requested the issuance of travel documents for the child from the Belgian Consulate of Mumbai. Following the refusal of the Belgian Federal Public Service of Foreign Affairs, the intending father applied for interim relief before the Belgian Courts. Holding in favour of the intending father, the Court ordered the Belgian State to deliver the necessary travel documents on the basis of the existence of a family life between the child and the intending father as well as the best interests of the child. The best interests of the child were invoked by the Court of First Instance of Brussels to justify the non-recognition of an Indian birth certificate and a recognition of paternity on the basis that it would not be ‘*in the interest of child C to establish his filiation based on acts drawn up in India, as the latter contravene fundamental principles of the protection of the interests of all children, since the acts derive from commercial transactions that are not concerned with the interests of the child*’ before finally agreeing to establish filiation on the grounds that ‘*this paternity would match the one established in India and would be in the interest of the child.*’²³⁶ This isolated decision does not, however, reflect the dominant position that the Belgian Courts seem to be developing.

In the case of *Amélie and Nina*,²³⁷ surrogacy took place in India with an Indian resident surrogate and Belgian resident heterosexual intending parents. The intending father is the genetic father of the children. The surrogacy took place through IVF with an anonymous egg donation. The birth certificates do not name the surrogate but do name the intending father. An application was made for the recognition of the Indian birth certificates. As in previous cases, the Court considered that the absence of the name of the surrogate on the birth certificates to be contrary to public policy and the requirements of the Civil Code and refused to recognise the certificates as birth certificates.²³⁸ The Court considered the

235 Civ. Brussels (interim), 6 April 2010.

236 Civ Brussels, 18 December 2012 and Brussels, 31 July 2013, *Revue trimestrielle de droit familial*, 2014/3, 541-560.

237 Civ. Nivelles, 6 April 2011.

238 See also the pending case before Civ. Brussels, 18 December 2012.

certificates not as birth certificates but as authentic acts. After verifying the authenticity of the birth certificates as well the validity of the birth certificates pursuant to Belgian law, the Court held that the law on the Belgian nationality of the intending father is applicable to establish parentage. The Court considered that the parentage of the intending father was established, as the conditions of Article 329*bis* Belgian Civil Code, on the acknowledgment of paternity, were fulfilled.

Belgian embassies seem to refuse to recognise birth certificates established as a result of surrogacy, without distinguishing between the intending father and mother and without analysing the certificate under the light of the principles currently resulting from the case law.

In a 2014 decision handed down in Brussels,²³⁹ the Belgian Court was asked to recognise two US judgments on parentage and the resulting birth certificates naming the intending (male) parents as parents of the children. The public prosecutor maintained that the birth certificates and the judgments conflicted with Belgian public policy, in particular with the '*mater semper certa est*' principle. However, the Court considered that there were no objections to the recognition, as none of the grounds for refusal in Article 25 PIL Code applied. As to the alleged conflict with Belgian *ordre public*, the Court observed that there were no reasons to doubt the validity of the procedure followed in the USA or the lawful manner in which the filiation was established there. While acknowledging that these children were born pursuant to a surrogacy arrangement, the undeniable conclusion was that this has been done in accordance with local law. Moreover, the American judgments did not violate the '*mater semper certa est*' principle because the surrogates were identified and they had given their consent in accordance with a local regulation that cannot of itself be deemed to be contrary to Belgian *ordre public*. The fact that there is no legislation on surrogacy in Belgium could not be a reason to refuse recognition. It should also be noted that the Court finds that it is in the best interests of the two children that filiation be established with respect to the applicants. The Court declares that the birth certificates (resulting from the two judgments on parentage) naming the intending parents as parents should be recognised. The Court notes that the effects of recognising the judgments on parentage are the same as those of a full adoption by two persons of the same sex. The Court concludes by noting that if the legislature believes it is desirable or necessary that there be legal certainty in relation to this subject matter, it is for the legislature to take the necessary steps.

239 Nederlandstalige rechtbank van eerste aanleg Brussels 2012/5418/B. The author acknowledges J. Verhellen for this reference.

(h) Evasion of the law

Article 18 PIL Code provides for non-recognition in the event of fraudulent evasion of the law. While this mechanism could be invoked to sanction the behaviour of the intending parents aiming at obtaining abroad the establishment of parentage following a case of surrogacy thus 'by-passing' Belgian law,²⁴⁰ the Belgian courts seem to refuse to apply – at times, to ignore – this method of non-recognition too strictly. Thus, some courts have considered that travelling abroad for the purposes of surrogacy does not of itself lead to the conclusion that there had been a fraudulent evasion of the law.²⁴¹ Other courts consider that when Belgian law is applicable to determine parentage, as designated by the rule of conflict of laws, there is no place to apply the evasion of the law exception to prevent recognition.²⁴² Matters are further complicated though by the requirement in Article 18 PIL Code that the difference between the possibilities under Belgian law and those under the foreign law must be the 'only' or sole purpose of the intending parents. A possible conclusion is that the evasion of the law principle provided by Article 18 PIL Code has to be considered on the facts of each individual case. The question remains whether the best interests of the child are served by solutions on a case-by-case basis.

(i) Best interests of the child, family life, and public policy

It can be observed that the best interests of the child principle are of considerable importance in both domestic and the international cases of surrogacy. Indeed, the best interests of the child have been invoked, for example, by courts in order to justify the approval of the adoption requested by the intending mother in order for the legal situation to correspond to the social reality and the child being raised by the intending mother and not by

240 A position defended by P. Wautelet, 'Un nouvel épisode dans la saga de la surrogacy transfrontière', note on Liège (1st ch.), 6 September 2010 and J. Verhellen, 'Inter-Country Surrogacy: A Comment on Recent Belgian Cases' [2011] *Nederland's International Privaatrecht* 657-662.

241 Civ. Antwerp, 19 December 2008: 'The theory of law evasion must be approached with caution. There can only be a case of law evasion if there is proof that the only aim of the applicants was to escape the Belgian law. It is not proven that the applicants have sought refuge in a hospital in Ukraine, with the sole aim of obtaining a birth certificate in which the first applicant would be declared as the mother of the child instead of the surrogate mother. The main objective of the applicants was undoubtedly to fulfil their explicit and long-time desire to have children of their own, genetically speaking'. See also Civ. Brussels, 15th of February 2011, *Revue@dipr.be*, 2011, 130: 'There can only be fraud to the law if it can be proven that applicant's only purpose was to escape the Belgian law, quod non; The unfortunate and even illegal attempt by the applicant to collect the child in Ukraine is not an element that should be taken into consideration when examining the validity and legality of the birth certificate.'

242 See, e.g., Civ. Nivelles, 6 April 2011, *Rev. trim. dr. fam.*, 2011, 695: 'There is no reason to examine the validity of disputes in relation to the exception of public order of private international law (Article 21 of the Code of international private law) or the fraudulent evasion of the law (article 18 of the Code of international private law), as the application of these mechanisms is conditions to the designation of a foreign law' laws, in matters of parentage, on the modification of the nationality of the parties.' This stricter interpretation of the notion of fraudulent evasion of the law could be justified by the realisation that it would be incongruous to sanction a behaviour as aiming to escape Belgian law if Belgian law is applicable.

the surrogate. When surrogacy raises questions of a domestic nature (i.e., request for adoption in Belgium following a surrogacy taking place in Belgium or abroad), it seems that the genetic reality influences the outcome of the dispute. The bias towards genetic reality seems to justify a second-parent adoption in cases where the intending mother is also the genetic mother even when an amount of money is suspected to have been given to the surrogate mother. In contrast, a refusal is given to the request of adoption if the intending mother has no genetic relation to the child in the framework of a commercial surrogacy.

The best interests of the child have also been invoked to justify the issuance of travel documents to enable children born to intending Belgian national and resident parents to travel to Belgium²⁴³; to justify the establishment of the parentage of same-sex intending fathers in relation to children born in California, independently of the nullity of the surrogacy agreement²⁴⁴; or even to justify the adoption of a child by the intending mother after a surrogacy concluded in Ukraine in order to match the legal reality with the genetic and social-psychological reality.²⁴⁵ The notion of family life (as understood in the context of Article 8 ECHR) also seems to be invoked by courts to support the reference to the principle of the best interests of the child.²⁴⁶

It follows from the review of these Belgian cases that it will only be in the clearest cases of abuse that the *ordre public* exception will be applied to withhold a parentage determination in favour of the intending parents or prevent a court from granting an adoption order.

3.6.3 *Payments in surrogacy*

It should be noted that few of the reported judgments refer expressly to the sums paid to surrogates or third-party intermediaries during the surrogacy process. However, in the absence of specific legislation and based on the case law, commentators suggest that payments beyond reasonable expenses are contrary to public policy.²⁴⁷ In short, a tentative conclusion is that altruistic surrogacy is tolerated as demonstrated by the decision of the District Court of Turnhout on 4 October 2000 discussed above.

In the case of *Hanne and Elke* (surrogacy arrangement in Ukraine by heterosexual intending parents), it was revealed that an amount of Euro 30,000 was paid by the

243 Civ. Brussels (interim), 6 April 2010, *Revue trimestrielle de droit familial*, 1164: 'That the best interest of the child does not appear to be, in view of these elements, to stay in India – country in which he does not seem to have any link – without M. R., a situation that appears contrary to the article 8 of the European Convention of Human Rights.'

244 Liège, 6 September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, 1139.

245 Youth Court Antwerp, 22 April 2010.

246 J. Sosson, 'La filiation d'enfants nés d'une gestation pour autrui à l'étranger', note on Liège, 6 September 2010, 4 *Revue trimestrielle de droit familial* 1153.

247 Verschelden and Verhellen at the Aberdeen Workshop.

intending parents to a Ukrainian law firm. According to the parties, these costs included legal advice as well as fees relating, for example, to travel, translations, IVF attempts, ultrasounds, and post-natal medical care. When the procedure of adoption was engaged by the adopting mother, the Court considered that it did not have before it sufficient information to assess whether the amount exceeded the normal amount of compensation concerning the costs resulting from surrogacy and concluded that the parties acted without the intention to make a profit.²⁴⁸

In the case of a domestic case of surrogacy, the Court of Appeal of Ghent took a more severe position.²⁴⁹ Realising that an amount of Euro 1,600 was paid monthly by the intending parents to the surrogate, the Court refused to approve the adoption, considering that an adoption resulting from a contract of for-profit surrogacy could not be based on a fair basis, regardless of the *de facto* parent-child relationship existing between the child and the intending mother. The Court considered that a commercial surrogacy contract is contrary to human dignity and that an adoption aiming at disguising the buying/selling of a child is illegal. In the case, it must be highlighted that the surrogate mother was also the genetic mother of the child, which seems to justify the position taken by the Court more than the fact that a contract was concluded.

3.6.4 *Nationality of the child*

In response to the European Committee on Legal Co-operation's and the Centre for Migration Policy Development's joint questionnaire on the 'Feasibility study on a possible instrument with regard to the issue of nationality law and families,' the submission of the Belgian respondent wrote:

There is no such thing as specific legal basis governing the acquisition of citizenship of a child born to a surrogate mother. The question of whether a child of a surrogate mother, which at least one parent is Belgian intentional, can be given Belgian nationality involves examining first whether the parentage of the child toward the parent 'intentional Belgian' was validly established under Belgian law. If the birth has been established abroad and that the intended parents are designated as the child's parents, there will need to consider whether the birth certificate / court decision (establishing this birth) can be recognized (e) by the Belgian authorities on the basis of the provisions relevant to the case of our Code of Private International Law (see: in this respect Articles 18 and 21, 25, 27 and 62). In this particular context, it should be noted that filiation –

²⁴⁸ Youth Court Antwerp, 22 April 2010.

²⁴⁹ Appeal Court of Ghent (15ième ch.), 30 April 2012.

preliminary question to the determination of Belgian nationality – is frequently assessed by our Courts.²⁵⁰

The principal question to determine nationality under Belgian law is one of filiation. A child can acquire Belgian citizenship either on the basis of the nationality of his or her legal parents or his or her birth on Belgian territory or by the collective effect of an acquisition act.²⁵¹

Attribution of Belgian nationality to a child rests on the basis of the nationality of the legal father, the legal mother, or the adopting parent at the time of birth.²⁵² A child is automatically Belgian if he or she is born in Belgium to a Belgian parent at the moment of birth or if he or she is born abroad to a Belgian parent born in Belgium. Belgian nationality is also attributed to a child born abroad to a Belgian parent with the condition that his or her parent undertakes a declaration to request the attribution of Belgian nationality to the child before he or she is five years of age.

Attribution of Belgian nationality may also be established on the basis of a child's birth in Belgium.²⁵³ In certain limited circumstances, the child will be attributed Belgian nationality on the basis of his or her birth on Belgian territory even if his or her legal parents are not Belgian. Such is the case of a child who would be stateless if the Belgian nationality was not attributed. In this hypothesis, the attribution of Belgian nationality is conditioned to the fact that the child cannot obtain another nationality, through the execution of an administrative procedure by his or her parents before the diplomatic or consular authorities of their country of origin.

250 Council of Europe's 'Study for the Feasibility of a Legal Instrument in the Field of Nationality Law and Families (including the promotion of acquisition of citizenship)' CDCJ (2012) 11, 99).

251 A helpful guide to the nationality rules is provided by the Belgian Foreign Affairs Office, *available at*: <http://diplomatie.belgium.be/en/services/services_abroad/nationality/declaration_children/>.

252 Article 8 Belgian Nationality Code 2013 (as amended). Article 8(1) reads: 'The following are Belgian citizens: 1. Any child born in Belgium to a Belgian parent (on the date of birth of the child); 2. Any child born abroad: A. to a Belgian parent (on the date of birth of the child) born in Belgium or in territories under Belgian sovereignty or administered by Belgium; B. to a Belgian parent (on the date of birth of the child) who has made a declaration, within five years of the birth, claiming Belgian nationality for their child; C. to a Belgian parent (on the date of birth of the child), provided that the child does not have or does not retain another nationality until the age of eighteen or their emancipation before this age.'

253 Articles 10 and 11 Belgian Nationality Code. Article 10 reads: 'The following is a Belgian citizen: any child born in Belgium and who, at any time before the age of eighteen or emancipation before this age, would be stateless if they did not have this nationality.' (However, this will not be the case if the child can obtain another nationality subject to fulfilment by their legal representative(s) of an administrative procedure with the diplomatic or consular authorities of the country of their parents or of one of them).'

If a child born by way of surrogacy is adopted,²⁵⁴ domestic adoption law requires the competent authorities to keep a record of all data available with regard, for example, to the identities of the legal mother and father.²⁵⁵

Belgian nationality law provides that a person born abroad, who did not have his or her main place of residence in Belgium between the ages of 18 and 28, has to sign a declaration to retain Belgian nationality before the age of 28.²⁵⁶ This may be relevant to a number of surrogate-born children, if they live outside of Belgium and also possess another nationality.

It would seem from the review of the reported case law above that the partial recognition of the foreign birth certificate establishing the parentage of the intending father usually leads to the issuance of a Belgian passport to the child allowing him or her to travel to Belgium.

3.6.5 *Birth registration and records*

If the child has not been registered within 15 days following his or her birth in Belgium,²⁵⁷ the birth must be registered by the institution where the child was born.²⁵⁸ Any failure to comply with the registration and notification obligations is subject to criminal prosecution (Article 361 Belgian Criminal Code). Anyone who obstructs the drawing up of a birth certificate or destroys a completed birth certificate may also be subject to criminal prosecution (Article 363 Belgian Criminal Code).

The birth of a child abroad should be registered with the local authorities who will issue a birth certificate. Certain consulates can issue birth certificates.²⁵⁹ A foreign birth certificate which establishes the presumption of paternity or a foreign acknowledgement of parentage may potentially be recognised in Belgium. If it fulfils certain conditions, it can be transcribed into the civil status registers of a Belgian municipality.

254 Article 9 Belgian Nationality Code provides: 'The following shall become Belgian citizens on the date the adoption becomes effective, provided they have not reached the age of eighteen or are not emancipated on this date: 1. Any child born in Belgium and adopted by a Belgian national; 2. Any child born abroad and adopted: A. by a Belgian national born in Belgium or in territories under Belgian sovereignty or administered by Belgium; B. by a Belgian national who has made a declaration, within five years of the date on which the adoption became effective, claiming Belgian nationality for their adoptive child who has not reached the age of eighteen or is not emancipated before this age; C. by a Belgian national, provided that the child does not have another nationality.'

255 For an overview of the Belgian law on adoption, see the report and guide commissioned by the Belgian Ministry of Interior available at: <http://justitie.belgium.be/nl/binaries/L/adoption_tcm265-142547.pdf>.

256 Article 22(1)(5) Belgian Nationality Code (as amended).

257 Article 55 Belgian Civil Code.

258 Article 56(1) and (2) Belgian Civil Code.

259 Article 1 Law 12 July 1931 relative to the competence of diplomatic and consular agents.

As considered above, intending parents may seek to establish parentage in relation to the child either through a procedure of adoption, undertaken by the intending mother or by both of the intending parents, or by a procedure of approval of the acknowledgement of paternity by the intending father. A tentative conclusion is that in those cases where the national authority is aware of the surrogacy, the fact that the child was born to a surrogate is likely to be documented. When the intending mother's application to adopt the child is approved, her name is entered onto the register as the child's legal mother, but it remains clear that she is the adoptive mother. The information that the child has another birth mother remains on the register. Although known guidance or good practice has been issued, it would seem that the child may later access the data if he or she so chooses.

3.6.6 *National considerations*

The Belgian legal order has experienced multiple reported instances of surrogacy: domestic cases of surrogacy; Belgian resident surrogates and foreign resident intending parents; and, most commonly, Belgian national and resident intending parents and foreign surrogates. The analysis of the reported case law presented demonstrates that the Belgian courts are confronted with questions of a very diverse nature in matters of surrogacy. A tentative conclusion is that the Belgian approach is to tolerate surrogacy, and, where appropriate in the interest of child protection and where breaches of the law and child protection policy are identified, to sanction surrogates and intending parents under civil and/or criminal law. This assessment and development of the case law could lend to the conclusion that Belgian courts consider that it is usually in the best interests of the child to see his or her parentage maintained or established in relation to his or her intending (genetic) parents, regardless of the commercial or altruistic nature of the surrogacy (to the extent that such a distinction can be made), with the courts often basing their decisions with reference to the rights of the child and the family unit protected by the ECHR and the CRC.

Currently, only heterosexual couples have access to surrogacy in Belgium as carried out in a limited number of Belgian hospitals. These restrictions appear to be as a result of the medical guidelines and eligibility requirements set by these hospitals such as the sterility of the intending mother or her inability to complete a pregnancy to term.

Notwithstanding the fact that Belgian law can, on a case-by-case basis, deal with the establishment of parenthood following surrogacy arrangements, it is clear that the situation is far from satisfactory, particularly if there is an ambition to ensure that the surrogate-born child's legal status, from birth, is guaranteed and certain. While the legal paternity of the intending (genetic) father can usually be established, it appears that the courts refuse to consider that a foreign birth certificate could establish the maternal parentage of the intending mother even when her name is mentioned, as it is the case in Ukrainian law.

The legal position of a child born as a result of surrogacy is therefore uncertain at birth and dependent upon the parties involved in the surrogacy and their (genetic) relationship and particular wishes with respect to the child.

Adoption may also be an option for intending mothers (with no genetic relation to the surrogate-born child) and for second parents in order to ensure that filiation is established. From the reported decisions handed down, two clear trends can be distinguished: firstly, the preservation of the best interests of the child, and secondly, ensuring compliance with Articles 6 and 1128 Belgian Civil Code. In this context, there have been two reported judgments favourable to the adoption of a child conceived with the gametes of the married intending parents and the child carried and delivered without remuneration by the sister of one of the couples.²⁶⁰ It should be noted that the law on adoption was amended by law of 24 April 2003, which came into force on 1 September 2005, and imposes stricter conditions. As a result, it appears from the research literature that there is no certainty that an adoption requested to regularise the situation abroad in the context of surrogacy will be successful necessarily.²⁶¹

In light of the legislative gap with respect to surrogacy, legislative proposals have been tabled at parliamentary assemblies with the objective of either expressly forbidding for-profit surrogacy agreements or for legally permitting surrogacy agreements under certain conditions. The proposals aim to legally frame and permit certain types of surrogacy under certain conditions.²⁶² As Verhellen and Verschelden observe, there are differences in the types of surrogacy that are permitted under the four proposals, as well as different eligibility requirements for the intending parent(s) and the surrogate; different framings of legal parenthood upon the birth of the child (two of which provide that this surrogate mother is the legal parent at birth, two of which attribute the intending parent(s) with legal parenthood at birth), different formalities for the execution of a surrogacy agreement, and different roles for the judiciary and national authorities. Nevertheless, a number of common elements to each of the Belgium proposals to provide a framework for surrogacy have been identified by Verhellen and Verschelden and can broadly be summarised as follows: that the surrogacy agreement must be altruistic (undefined in practice), there must be a medical need that requires the use of surrogacy, and there must be a genetic link between the child and at least one of the intending parents.²⁶³

260 Juvenile Court of Brussels, 4 June 1996, J.L.M.B. 1996, 1182 and *Revue du Droit de la santé* 1997, 124. Juvenile Court of Turnhout, 4 October 2001, R. W. 2001, no. 6 of 6 October 2001.

261 Articles 342 to 353 Belgian Civil Code.

262 As summarised in L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States' [2013] European Parliament 206.

263 Verhellen and Verschelden at the Aberdeen Workshop.

3.7 THE NETHERLANDS

3.7.1 *Overview of the domestic approach to surrogacy*²⁶⁴

There is no express provision for surrogacy in Dutch law on parentage, and there is no special procedure geared towards transferring parental rights and responsibilities from the surrogate (and her husband) to the intending parents. Nevertheless, surrogacy is tolerated under certain very strict conditions, and fertility clinics that provide IVF for surrogacy arrangements have, since 1998, been required to comply with the professional guidelines of the Dutch Society for Obstetrics and Gynaecology.

In a letter from the Secretary of State for Health and Justice to the Chairman of the Dutch House of Representatives (2011-2012), Teeven wrote:

Surrogacy (carrying and giving birth to a child for another couple) has been reported in the Dutch media frequently in recent years. In this process different opinions and interests have come to light. This letter seeks to inform the Chairman of the House of Representatives of the direction and formulation of new policy the Secretary of State (of Safety and Justice) would like to undertake concerning surrogacy.

The letter written on the 4 November 2009 (Kamerstukken II 2009/10, 32 123 XVI, nr. 30) by the then Minister of Justice summarises policy at that time. That letter announced an investigation into the nature and scope of surrogacy and the illegal entry of foreign children into the Netherlands. This investigation led to the report by the Utrecht Centre for European Research into Family Law (UCERF) on Surrogacy and Illegal Entry of Children, which was presented to the House of Representatives on 1 March 2011 (the 'UCERF Report').

The UCERF Report concludes that the Centre was unable to determine the frequency of surrogacy and illegal entry of foreign children into the Netherlands.

²⁶⁴ The author is grateful to and acknowledges his many discussions with Dutch family law expert Kees Saarloos. Particular attention in this part of the research has been given to HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements completed and submitted by the Netherlands (*available at*: <www.hcch.net>); M. Vonk, 'Maternity for Another: A Double Dutch Approach' [December 2010] 14(3) *Electronic Journal of Comparative Law*; the detailed report prepared by the University Utrecht's Centre for European Research into Family Law entitled 'Commercial Surrogacy and the Unlawful Placement of Children in the Netherlands' (K. Boele-Woelki *et al.*) *available at*: <<http://english.wodc.nl/onderzoeksdatabased/raagmoederschap.aspx>>; I. Curry-Sumner and M. Vonk, 'National Report on the Netherlands' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17; and the country report on the Netherlands in L. Brunet *et al.*, 'A Comparative Study on the Regime of Surrogacy in EU Member States' Directorate General for Internal Policies, Legal and Parliamentary Affairs, May 2013, 302-323.

In its letter of 1 March, the Secretary of State suggests an exchange of ideas with the House of Representatives after a consultation and meeting with experts on the subject of surrogacy. This meeting took place on 31 March 2011. The meeting showed that the opinions of experts on the subject of surrogacy varied considerably and failed to shed light on possible implications for policy.

The subject on surrogacy is complex; partly because of the ethical, judicial and social psychological dimensions. A cautious approach is warranted. This letter provides a brief overview of the present situation of surrogacy in the Netherlands and abroad, secondly it highlights the problematic points on the subject and proposes a number of measures that could provide a solution for the problems.²⁶⁵

While no published data are available in the Netherlands to confirm the frequency of surrogacy,²⁶⁶ it is understood from the Secretary of State for Health's letter, as well as the case law referred to below, that the Netherlands is encountering recurring instances of surrogacy. From the review of the case law, it can be observed that the Dutch legal order has had cause to consider inter-country surrogacy in at least two key areas: the intending parents indicate that parentage has been created (1) by means of a decision of a foreign judgment or (2) by means of a legal fact (for example, the birth of a child subsequently recorded in a birth certificate) or legal act (for example, a recognition by a intending father).

The underlying objectives of current Dutch law in this field are that commercial surrogacy and the unlawful placement of children are undesirable. A number of legislative provisions have been enacted to respond to these objectives, in the field of both criminal law²⁶⁷ and immigration law. The criminal law policy is focused on the discouragement of surrogacy. This is partly achieved through the criminalisation of intermediaries. Furthermore, the placement of a child in another family without prior satisfaction of the national reporting requirements is also criminalised in certain circumstances according to the Dutch Criminal Code and the Foster Care Children Act. Dutch criminal law has also incorporated a number of general offences such as the offence of buying a child.

In its replies to the Committee on the Rights of the Child, the Netherlands summarised its position on surrogacy as follows²⁶⁸:

²⁶⁵ English translation of letter on file with author.

²⁶⁶ Note that the Dutch response to the HCCH 2014 Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (*available at*: <www.hcch.net>) confirms that 'No information is available').

²⁶⁷ Articles 151(b) and 151(c), 225, 236, 278, 279 and 442a Dutch Criminal Code.

²⁶⁸ CRC/C/OPSC/NLD/Q/1/Add.1, 30 December 2008.

If the intended parents have taken on the care and upbringing of the child concerned, they must report this to the executive of the municipality in which the child is resident (section 5 of the Foster Children Act). If the intended parents wish to adopt a child under six months of age who was born to a surrogate mother, they require prior written consent from the Child Protection Board. Failure to obtain this consent is a criminal offence (art. 442a of the Criminal Code; art. 151a of the Criminal Code). Furthermore, in such a case, the Child Protection Board may ask the court order to appoint a temporary guardian for the child (*voorlopige voogdij*) (art. 1:241, paragraph 3, of the Civil Code).

In all reported cases in which the mother gives her child up to someone else, including relinquishing it in the context of surrogacy in the Netherlands, the Child Care and Protection Board conducts an investigation.

If the child is incorporated into the intended family in accordance with the formal criteria (Standards 2000) and there are no contraindications, the Board can be asked to seek a court order relieving the mother/parents of her/their parental responsibility to pave the way for the assignation of parental responsibility to, and adoption by, the intended parents. In the Netherlands the principle of *mater semper certa est* applies.

The guidelines of the Dutch Society for Obstetrics and Gynaecology do not formulate specific requirements in terms of place of residence, home, or nationality on the surrogate or the intending parents. However, it is understood that certain surrogacy centres require, for example, that the parties are Dutch residents.²⁶⁹ Moreover, each of the parties involved – that is, the intending parents, the surrogate, as well as her partner, if appropriate – must be informed orally and in writing of all the potential consequences of engaging in a surrogacy arrangement (medically, psychologically, and legally) in order to ensure that free and informed consent is obtained.

Under Dutch law, acts (including agreements) that violate mandatory statutory provisions or are contrary to good morals are null and void, which means that they are treated as if they never came into being and are not enforceable. Vonk comments that ‘contracts’ *‘concerning the surrender of children after birth are considered to be a breach of good morals. Contracting about the legal position of children, for instance who will be the child’s legal parent, may violate the mandatory statutory provisions of parentage law and parental responsibility which would render such a contract illegal and void.’*²⁷⁰ Intending parents and

269 Presentation of I. Curry-Sumner and M. Vonk at the Aberdeen Workshop.

270 M. Vonk, ‘Netherlands: Maternity for Another: a Double Dutch Approach’ [December 2010] 14(3) Electronic Journal of Comparative Law 3.

surrogates cannot therefore enter into enforceable ‘contracts’ concerning the status of legal parenthood if this deviates from mandatory statutory provisions, and they cannot be obliged on the basis of a contractual provision to surrender a child to the other party. This does not mean that such contracts are without meaning. While the agreement itself cannot alter or establish the legal status of intending parents, it appears from case law (discussed herein) that the written record of the intentions of the parties can provide evidence to the court and thus may facilitate decisions in the adoption or other court process.

3.7.2 *Legal parenthood in the context of surrogacy*

Dutch law does not specifically regulate the consequences of surrogacy in the field of parentage. Accordingly, the regular rules in the field of parentage, parental responsibility, and child protection apply in these cases.

It should be noted that the law on parentage in Book 1 of the Dutch Civil Code was amended on 1 April 2014. The discussion below considers both the previous and current legislative position with respect to legal parentage, mindful that the reported case law deals principally with the historical position.

(a) **The grounds for legal maternity**

Under Dutch law, since 1 April 2014, legal maternity can be established in a number of ways: by dint of birth (the woman who gives birth to the child is the child’s legal mother, whether or not she is also the child’s genetic mother), by marriage or registered partnership (broadly speaking, the woman who is at the moment of birth of the child married to or in a registered partnership with the woman who has given birth to the child conceived through artificial donor insemination), by acknowledgement (pre- or post-birth), and by adoption.²⁷¹ Prior to 1 April 2014, the woman who gave birth to the child or who adopted a child was

²⁷¹ Since 1 April 2014, Article 1:198 DCC (Book 1) reads: ‘Mother of a child is the woman: a. who has given birth to the child; who at the moment of birth of the child was married to or is in a registered partnership with the woman who has given birth to the child, in case the child has been conceived through artificial donor insemination as defined in Article 1(c)(1) of Wet donorgegevens kunstmatige bevruchting, provided that this is confirmed by a certificate that is given by the foundation established by that act, which confirms that the identity of the donor is not known to the woman who underwent the artificial donor insemination, unless the last sentence of this sub-paragraph or the first sentence of Article 199(b) applies. The certificate should be presented to the Registrar of Civil Status when making the certificate of birth and has retroactive effect to the birth of the child. In case the marriage or the registered partnership ends after the artificial donor insemination but before the birth of the child due to the death of the spouse or registered partner of the woman who gave birth to the child, the deceased spouse or deceased registered partner will be the mother of the child if the aforementioned certificate is submitted during the declaration of birth of the child, even if the woman who gave birth to the child has remarried or has registered a new partnership; c. has recognised the child; d. whose parentage has been judicially determined; e. has adopted the child.’ Pre-1 April 2014, Article 1:198 DCC read: ‘Mother of a child – The woman who has given birth to a child or who has adopted a child is the mother of that child.’

the legal mother of that child. The grounds for legal maternity are therefore much broader in the Netherlands compared to the other research systems so far considered.

(b) The grounds for legal paternity or parenthood of the second parent

If the surrogate is married, then her husband or registered partner is automatically the child's legal father or second legal parent.²⁷² Legal paternity can also be established by acknowledgement of paternity (pre- or post-birth), judicial establishment, or adoption.²⁷³ A child born abroad can be acknowledged in the Netherlands.²⁷⁴

Until 1 April 2014, the married intending father could, under certain circumstances, recognise the (birth mother's) surrogate's child with her prior written consent. This was only possible if there was no other legal parent than the surrogate since a child can only have two legal parents.²⁷⁵ Moreover, a close personal relationship between the married intending father and the child was required²⁷⁶; for instance, this may have been the case if the child has been living with the intending father for some time after its birth. As from 1 April 2014, the requirement of the prior written consent of the surrogate has been removed for the purposes of acknowledgement.

(c) Transfer of parenthood

It is possible for a child born of surrogacy to have in the Netherlands at birth: (a) only one legal parent who may or may not be genetically linked; (b) two legal parents who have no genetic connection to the child; (c) two legal parents both of whom may be female, one of whom may be genetically linked to the child.²⁷⁷

272 Article 1:199 DCC (Book 1) reads: 'Father of a child – The father of a child is the man: a. who, at the time of birth of the child, is married to or has a registered partnership with the woman who has given birth to that child, unless the provision under point (b) is applicable; b. whose marriage to or registered partnership with the woman who has given birth to the child, has been dissolved because of his death within a period of 306 days before the birth of the child, even if the mother has remarried or has registered a new partnership; if, however, the woman was legally separated from her husband since the 306th day before the birth of the child or if she and her husband lived separately since that moment, then the woman may, within one year after the birth of the child, declare before the Registrar of Civil Status that her deceased husband is not the father of the child, which declaration will be written down in a certificate of civil status; in such event the man with whom the woman is married at the time of birth shall be the father of the child; c. who has officially recognized paternity of the child; d. whose legal paternity has been established, or; e. who has adopted the child.'

273 Article 10:199(c) DCC (Book 1).

274 Article 1:203 DCC (Book 1).

275 Article 1:204(3)(b) DCC (Book 1) reads: 'the permission of the mother of the child who has not yet reached the age of sixteen, or the permission of the child aged twelve or older can be replaced by judicial authorisation on the request of the person who wants to recognise the child, unless this will damage the interest of the mother in an undisturbed relationship with the child or will damage a balanced social-psychological and emotional development of the child, provided that this person is b. the biological father of the child who is not the person who conceived the child, and is in a close personal Relationship with the child.'

276 Article 1:204(1)(e) DCC (Book 1).

277 Article 1:198(1)(b) DCC (Book 1). See also Article 1:227(4) DCC and 1:230(2) DCC (Book 1).

The transfer of full parental status (as well as rights and responsibilities) will not occur against the will of any of the parties involved. This means that the surrogate has no legal obligation to hand over the child and the intending parents are under no legal obligation to accept the child. Nevertheless, according to Curry-Sumner and Vonk, there are broadly three routes to full parental status for the intending parents: divestment of parental responsibility followed by adoption, acknowledgement by the intending father followed by divestment of parental responsibility and partner adoption, and acknowledgement followed by transfer of sole parental responsibility from the surrogate to the intending father followed by partner adoption.²⁷⁸

(d) Inter-country surrogacy and private international law on parentage

Since 1 January 2012, if a Dutch couple travel abroad for the purpose of engaging in a surrogacy arrangement and return with a child, the Dutch PIL on parentage (DCC²⁷⁹) will apply in order to determine questions related to the legal status of the child. From a review of the case law and commentary, there are, broadly speaking, two different surrogacy scenarios, which mirror the circumstances in each of the other research jurisdictions hereto considered. Firstly, the intending parents are the child's legal parents in accordance with the parentage laws of the country where the child was born. For instance, this could have occurred by operation of law, by registration on the birth certificate, or by means of a judicial or administrative legal determination of parenthood. Secondly, the intending parents are the birth parents of the child pursuant to an adoption order either in the country of the child's habitual residence or in the country where the parents habitually reside.

It is important to distinguish between these two methods of establishing legal parenthood because the laws applicable for the recognition of the established legal parenthood differ in the Netherlands. With respect to adoption, different legal instruments may be applicable, namely, the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption 1993, the Dutch PIL rules on the recognition of adoptions,²⁸⁰ Dutch law regulating the adoption of foreign children,²⁸¹ and the Placement for Adoption (Children of Foreign Nationality) Act (WOBKA²⁸²). In order to explain how

278 I. Curry-Sumner and M. Vonk, 'National Report on the Netherlands', in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17.

279 Title 8 Book 10 DCC. This book is a codification and consolidation of existing Dutch PIL in the context of filiation and family law matters. An English translation is available at: <www.dutchcivillaw.com/civilcode-book01010.htm>.

280 Book 10, Title 6, Section 3 (Articles 10:107-111) DCC.

281 Book 10, Title 6, Section 2 (Articles 10:105-106) DCC.

282 Act of 8 December 1988 (bulletin of Acts and Decrees 1988, no 566), containing rules concerning the placement in the Netherlands of foreign children with a view to adoption, as amended by the act of 14 May 1998 (Bulletin of Acts and Decrees 1998, no. 302).

Dutch law currently deals with parentage that has been established abroad in surrogacy cases, the following sections summarise the rules with regard to these different situations.

(e) Conflict of law rules

Due to the lack of specific PIL rules applicable in cases of surrogacy, reference must be made to the rules laid down in Title 5 of Book 10 of the DCC. The first three sections consist of conflict rules on parentage, the fourth section consists of the law applicable to the effects of parentage, and the fifth section consists of the recognition of legal parentage laid down in a foreign judgment or a foreign instrument of civil status.

Dealing first with the choice of law rules, these apply to acts and facts concerning parentage that take place in the Netherlands. Article 10:92(1) DCC provides that the question whether the child is legally affiliated with the woman to whom he or she is born and the man to whom she is or was married shall, in the first place, be determined by the law of the common nationality of the woman and the man. If the woman and the man do not have a common nationality, the law of their common habitual residence applies. If the purported parents do not share a common habitual residence, the law of the habitual residence of the child applies. Article 10:93 DCC determines the law applicable to the annulment of legal parentage based on marriage. The first paragraph provides that the law applicable to such an action is the law that applies to the existence of the legal parentage according to Article 10:92(1) DCC.

Article 10:94 DCC provides the choice of law rule for maternal parentage of a child born out of wedlock. According to paragraph one, the national law of the mother determines whether the woman to whom the child is born is the legal mother by dint of birth. If the mother has more than one nationality, the law according to which legal maternity exists *ex lege* must be chosen. The second sentence of the first paragraph adds that if the birth mother has her habitual residence in the Netherlands, her maternity always exists by dint of birth.

The law applicable to the acknowledgement of paternity is determined by Article 10:95 DCC. However, Article 10:95 DCC only applies if the acknowledgement of paternity takes place in the Netherlands. The recognition in the Netherlands of legal paternity based on an acknowledgement abroad is governed by the protective rules set out in Article 10:101 DCC.

According to Article 10:97 DCC, the judicial establishment of legal paternity is subject to the same conflict rule as legal parenthood on the basis of marriage (Article 10:92(1) DCC). The action for judicial establishment of paternity is governed by the common national law of the purported father and the child's mother. If they do not have a common national law, the law of their common habitual residence applies, and if they do not have

a common habitual residence, the law of the child's habitual residence applies.²⁸³ According to Article 10:97(3) DCC, the nationality or the habitual residence has to be determined at the moment the applicant applies for judicial establishment.

Title 6, on adoption, provides that an international adoption is governed by Dutch law.²⁸⁴ By contrast, the consent of the child's parents or other persons or bodies is governed by the child's national law.

(f) Recognition of legal parentage in foreign judgments and foreign authentic acts

Recognition in the Netherlands of foreign judgments and authentic acts is afforded, in principle, by operation of law, irrespective of the law that was applied by the foreign court or civil status authorities. For the purposes of Dutch rules of recognition, the relevant local formal conditions need to be satisfied. There are some exceptions to this.

In the context of foreign judgments, Article 10:100 DCC provides that a foreign judgment on parentage will not be recognised if (a) the foreign court had no jurisdiction, (b) there is an absence of proper investigation or proper administration of justice preceding the foreign judicial decision, or (c) the recognition of the foreign judgment would be manifestly incompatible with public policy. It should be noted that Article 10:100(2) DCC restricts the scope of application of the public policy exception in that the recognition of the foreign judgment cannot be refused on the ground of incompatibility with public policy, even when a Dutch citizen is involved, for the sole reason that another law has been applied to this decision than the law which would have been applicable according to Dutch conflict rules.

Article 10:101 DCC sets out the conditions that must be satisfied in order to recognise a foreign legal act or fact in the Netherlands. Under Dutch law, the choice of law rules only apply to acts and facts concerning parentage that takes place in the Netherlands.²⁸⁵ If acts and facts have taken place abroad, which is invariably the case in the context of inter-country surrogacy, Article 10:101 DCC applies. In the Netherlands, acknowledgement by the father of a child leads to the acquisition of a deed or certificate of recognition. The criteria that apply in both situations are that the deed or certificate must have been issued by a competent authority, have been issued abroad, be laid down in a legal document, have

²⁸³ Book 10, Title 10.5, Article 10:97(2) DCC provides that 'where the man and woman have more than one common nationality, they shall be deemed not to have a common nationality for the purpose of the present Article.'

²⁸⁴ Book 10, Title 10.5, Article 10:105 DCC Applicable law.

²⁸⁵ I. Curry-Sumner and M. Vonk, 'National Report on the Netherlands', in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17, 286.

been made in accordance with local law, and not be contrary to Dutch public policy.²⁸⁶ Curry-Sumner and Vonk observe that *‘the majority of these conditions do not raise specific issues within the context of surrogacy, with the exception of two aspects in particular, namely that the deed or certificate must have been issued “in accordance with local law” and that recognition of the deed must not be contrary to “Dutch public policy”’*.²⁸⁷

Surrogate motherhood is not in itself contrary to Dutch public policy. In Article 10:101(2) DCC, three additional elements are to be taken into account in evaluating whether a foreign legal act or legal fact will be regarded as contrary to Dutch public policy, namely, (a) if the recognition is made by a Dutch national who, according to Dutch law, would not have been entitled to recognise the child; (b) if, where the consent of the mother or the child is concerned, the legal requirements applicable pursuant to Article 10:95(3) DCC were not complied with; or (c) if the instrument manifestly relates to a sham transaction. The first condition has raised a number of problems that are discussed below.

In addition to these specific public policy grounds, Article 10:101(1) DCC provides for a general public policy exception. The question arises whether inter-country surrogacy arrangements fall foul of this exception (e.g., whether the lack of a birth mother on the birth certificate should lead to non-recognition).

With respect to birth certificates, case law would appear to indicate that some birth certificates are refused recognition on the basis of a violation of Dutch public policy (as laid down in Article 10:101(1) DCC, in combination with Article 10:100(1)(c) DCC). Although it appears that a birth certificate which does not record the birth mother will be regarded as contrary to Dutch public policy,²⁸⁸ other cases with differing operative facts have shown that this is far from clear. Nevertheless, once the child is in the Netherlands, the child’s best interests are paramount.

(g) Best interests of the child, family life, and public policy

Following the birth of a child to a surrogate outside of the Netherlands, it has been suggested that it is not clear whether both intending parents will be able to acquire legal parenthood under Dutch law. As discussed above, no specific legislation on the subject of surrogacy is available under Dutch law; as a consequence, the judiciary has had to deal with the determination of the legal relationships between the surrogate, the intending parents, and

286 Article 10:6 DCC (Book 10): ‘Conflict with Dutch public order – Foreign law shall not be applied to the extent that the application thereof is obviously incompatible with public order.’ See also I. Curry-Sumner and M. Vonk, ‘National Report on the Netherlands’, in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17, 286.

287 See the examples provided by I. Curry-Sumner and M. Vonk, ‘National Report on the Netherlands’, in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17, 287-289.

288 *Ibid.*, referring to an unpublished decision of the District Court of The Hague (discussed below).

the child on an *ad hoc* basis. Cases have made reference to fundamental rights in both domestic and inter-country cases of surrogacy.²⁸⁹ In particular, it appears that rights protecting the interests of the child, such as Article 7 UNCRC (right to know and be cared for by one's parents), have had a significant impact on court decisions relating to the establishment of parentage in favour of the intending parents.²⁹⁰

One decision concerned a case of a Dutch surrogate and two Dutch men (intending parents) all living in the Netherlands.²⁹¹ To ensure that the surrogate did not appear on the child's birth certificate, the surrogate gave birth anonymously in France. As discussed with respect to France at section 3.3, anonymous birth, subject to certain conditions, is possible in France. One of the intending parents acknowledged his paternity before the French civil status registrar. The Dutch Court held that the French birth certificate violated Dutch public policy in that the legal maternity of the birth mother was not established, contrary to the *mater certa semper est*-rule. It also observed that the recognition would amount to a violation of international law (Article 7 UNCRC) inasmuch as the child's right to know his or her origins was interfered with.

A second decision concerned a case of a Dutch and an American man and their children born to a Californian surrogate.²⁹² At the moment of the birth, the parties resided in the USA. A Californian Court determined that the two men were the legal parents of the child, and this was recorded in a pre-birth Californian judgment. They were also named as the parents on the Californian birth certificates. The family then moved to the Netherlands, and a Dutch Court refused to recognise the Californian judgment on parentage on the basis of the same reasoning as the case of the French birth certificate (cited above), that is, it is contrary to Dutch public policy as the *mater certa semper est*-rule had not been satisfied and that the decision was handed down before the child's birth when the legal mother had yet to be established. Since the Californian authorities did not establish the legal maternity of the birth mother, neither the birth certificates nor the judgment could be recognised on the basis of a manifest incompatibility with Dutch public policy.²⁹³

289 *Ibid.*, 291.

290 Rb. Rotterdam 23 March 1998, NJkort 1998, 33; Hof Leeuwarden 6 October 2004, LJN: AR3391, available at: <www.rechtspraak.nl>. See also Rb. Utrecht 18 June 1997, NJkort 1997, 59, which was overruled on appeal by Hof Amsterdam 19 February 1998, NJkort 1998, 32.

291 District Court of The Hague, 14 September 2009, LJN: BK1197.

292 District Court of The Hague, 23 November 2009, case no. 328511/FA (unpublished) quoted in I. Curry-Sumner and M. Vonk 'National Report on the Netherlands', in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17, 292.

293 See K. Saarloos, 'European Private International Law on Legal Parentage? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition in Legal Parentage' (Dissertation, Maastricht University 2010), 272.

The reasoning of the Dutch Courts is open to challenge²⁹⁴ and begs an important question. If the surrogate has provided her informed consent to the judgment of parentage and has participated willingly to the surrogacy arrangement, why, in these circumstances, is the recognition of such a decision of itself contrary to Dutch public policy?

The Dutch Courts have had to consider whether family life existed between a Dutch intending father and a surrogate-born child. One decision²⁹⁵ concerned a case of a same-sex Dutch married couple who engaged an Indian surrogate with an egg donation from an anonymous Indian woman. The birth certificate of the child records the names of the surrogate and the name of the genetic father as parents. An action was filed for interim proceedings concerning the issuance of travel documents to the child. The Dutch Foreign Ministry refused to issue the travel papers on the basis that the child does not have Dutch nationality, as no relationship of parentage exists between the child and the genetic father. According to the Ministry of Foreign Affairs, the fact that the genetic father's name appears on the birth certificate does not mean that he should be regarded as the father of the child in Dutch law. The Dutch Court in interlocutory proceedings ordered the Dutch State to issue the travel documents to the child after establishing that the intending father already had 'family life' with the child and that, as such, this right pursuant to Article 8 ECHR required protection. The Court also noted that it is likely that, as a result of the interim judgment, the filiation of the child would be established with the intending father, which, once established, would mean that the child would be a Dutch national entitled to a Dutch passport. After balancing the various interests at stake, the Court found that in the present case, given the interests of the child and of the intending father and the existence of family life between the intending father and his son, travel documents should be issued.

Yet, in other cases, Dutch Courts have followed a different line of reasoning. One such decision²⁹⁶ involved an Indian surrogate and Dutch intending parents resident in the Netherlands. A gestational surrogacy was conducted using anonymous egg donation. The Indian birth certificate recorded the surrogate and the genetic intending father as the child's legal parents. Following the birth, the intending father also obtained a judgment from an Indian Court stating that he was the child's legal father. The intending father applied for a Dutch passport for the child. When the Dutch Consulate in Mumbai refused to issue a passport, he filed an application to a court for delivery of a passport. On 10 January 2011, the judge requested the Consulate in Mumbai to issue a travel document to the child. Once the child arrived in the Netherlands, the genetic father filed a declaration of paternity. The relevant Dutch Court subsequently appointed the intending father as guardian of the

294 I. Curry-Sumner and M. Vonk 'National Report on the Netherlands', in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 17, 293.

295 Rechtbank Haarlem (Interlocutory proceedings - Voorzieningenrechter), 10 January 2011, LJN: BP0426.

296 Rechtbank Haarlem, 28 November 2012, LJN: BY4231.

child. In May 2012, a Dutch passport was issued to the child. The proceedings introduced by the intending father before the Court of First Instance aimed to establish that the Consulate refused incorrectly to issue a Dutch passport to the child. The Dutch Court confirmed the position of the Consulate as it considered that the refusal to issue the passport was based on sufficient reasons given the absence of a legal parent-child relationship at the time the intending father submitted the passport application. In the Court's view, filiation with the intending father was therefore established by the declaration of paternity in the Netherlands and not by the Indian birth certificate mentioning his name.

The Dutch Courts have also had cause to consider the consequences of surrogacy in the context of the law on adoption.

A Dutch resident couple (the intending father had Austrian-Dutch nationality and the intending mother, Austrian nationality) travelled to England where they had entered into a gestational surrogacy arrangement involving the fertilised gametes of the intending couple.²⁹⁷ After the birth, the surrogate signed a declaration that she agreed with the adoption of the child by the intending parents. The Dutch Court stated that Article 2 WOBKA only allows for the adoption of foreign children if the prospective adoptive parents have obtained the consent of the Minister of Justice to adopt a foreign child. However, the Court reasoned that according to the legislative history of WOBKA, this law was not intended to cover the situation where the child to be adopted from abroad was conceived using the genetic material of the prospective adopters. In such cases, the Court held that the rules that apply in the Netherlands to adoption after IVF are applicable. The surrogate and the intending couple had complied with the laws in England and with the rules that apply to adoption after IVF surrogacy in the Netherlands. The Court, therefore, granted the adoption order, despite the fact that the couple had not obtained prior consent of the Minister of Justice to adopt a child from abroad.

However, bringing a child unrelated to either partner to the Netherlands without the prior consent of the Minister of Justice may result in serious civil and criminal risks for both the intending parents and the surrogate. Perhaps the most notorious example is the *Baby Donna* case.²⁹⁸ This matter concerned a Belgian surrogate who agreed to carry a child for a Belgian intending couple with the sperm of the intending father. Towards the end of the pregnancy, the surrogate informed the intending parents that she had miscarried. That turned out to be a lie. After the baby was born in February 2005, she handed the child over to a Dutch couple. It is reported that the Dutch couple had informed the appropriate Dutch authorities that they would receive a baby for adoption but not that it concerned a child

²⁹⁷ Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844.

²⁹⁸ Rechtbank Utrecht, 7 May 2008, LJN BD1068 and Hof Amsterdam, 25 November 2008, LJN BG 5157. See also the discussion at 3.6.2(c) in the context of Belgium.

born in Belgium.²⁹⁹ That being so, the couple had not followed the procedure and required framework for inter-country adoption. At the time the Dutch Court was confronted with the question of whether the child could remain in the care of the intending parents despite the fact that the couple had not proceeded in accordance with the relevant statutory provisions, the child had been living with the couple for some seven months. The District Court in Utrecht decided that there was family life existing between the child and the couple on the basis of the fact that the child had been living with them since her birth. Accordingly, the child was allowed to stay with the couple for the time being.

Meanwhile, the Belgian intending parents discovered that the surrogate had given birth to 'their' child. More than two years after the baby was born, DNA testing revealed that the intending father was the child's genetic father, a fact that had been contested by the surrogate from the start. The intending father subsequently started proceedings before a Belgian Court to have the child placed in his and his wife's care. The Court decided it would not be in the best interests of the child to leave the home and be separated from the family she had been living with since birth, despite the fact that the genetic father and his wife were very willing to raise her themselves.

3.7.3 *Payments in surrogacy*

While it is understood that, as a result of criminal law prohibitions and public policy reasons, no payments or other consideration are permitted, no reported case provides a detailed consideration of the level of payments or expenses paid as part of the arrangements. It is worth, however, recording the comments of the Netherlands in its report to the Committee on the Rights of the Child:

When the intending parents are resident in the Netherlands and the surrogate mother is resident in another country, the Parentage (Conflict of Laws) Act is in principle applicable. Commercial surrogacy is prohibited by law under article 151b of the Criminal Law. This includes a provision making it an offence to provide any professional or commercial mediation in this matter or to publicize the fact that a woman wishes to be a surrogate mother or is available as such. (30 December 2008)

The policy in the Netherlands is aimed at preventing commercial surrogacy, and accordingly, the behaviour that promotes supply and demand in relation to surrogacy has been

²⁹⁹ Facts summarised in M. Vonk, 'Maternity for Another: A Double Dutch Approach' [December 2010] 14(3) Electronic Journal of Comparative Law.

made a criminal offence.³⁰⁰ It is not known from the reported case law to what extent the national authorities are enquiring into the commercial aspects of surrogacy arrangements. For example, it is not known if medical or travel costs or, more broadly, reasonable expenses paid by the intending parents are understood and treated in practice. This comment is not to suggest that no enquiries are made but rather to suggest that if the underlying reasoning underpinning the current state of Dutch law in this field is that commercial surrogacy and the unlawful placement of children are undesirable, it would be helpful to understand how the authorities are dealing with the financial aspects to achieve these policy objectives.

3.7.4 *Nationality of the child*

According to the Dutch respondent to the Council of Europe's 'Study for the feasibility of a legal instrument in the field of nationality law and families (including the promotion of acquisition of citizenship)':

The child will acquire the Dutch nationality when one parent is Dutch. No distinction if the child is born in the Netherlands or abroad. Nationality *ex lege* for adoption. Surrogacy: the procedure for acquisition of nationality follows the rules of adoption.³⁰¹

These comments are helpful albeit misleading as it assumes that the nationality rules as they apply to adoption apply equally to cases of surrogacy, which is not the case given the absence of any express statutory footing. Article 1(c) of the Netherlands Nationality Act³⁰² defines 'mother' as 'the woman with whom the child has a family relationship in the first ascending degree, other than by adoption' and, in Article 1(d), 'father' as 'the man with whom the child has a family relationship of the first ascending degree, other than by adoption'. Article 3(1) provides that a '*child shall be a Dutch national if the father or mother is a Dutch national at the time of his or her birth, or if the father or mother was a Dutch national who died before his or her birth.*' In the Netherlands, therefore, Dutch citizenship derives from either legal parent regardless of marital status, but in the case of the unmarried father, he must either acknowledge his paternity or have his paternity determined by the

300 Parliamentary Documents II 2011-2012, 33 000 VI, no. 69. Criminalisation in Articles 151b and 151c Dutch Criminal Code.

301 Council of Europe's 'Study for the feasibility of a legal instrument in the field of nationality law and families (including the promotion of acquisition of citizenship)' CDCJ (2012) 11 103.

302 *Rijkswet op het Nederlanderschap* Kingdom Act on Netherlands Nationality (Netherlands Nationality Act 1985). Most recently amended by Kingdom Act of 18 December 2013, *Staatsblad* 2014, 10, available at: <http://wetten.overheid.nl/BWBR0003738/geldigheidsdatum_20-02-2014>.

court during the minority of the child.³⁰³ An additional condition is in place regarding the acquisition of the father's nationality for children born out of wedlock. Article 4(4) makes acquisition of Dutch nationality for children born out of wedlock to a foreign mother and a Dutch father conditional upon proof of the 'genetic truth' in cases where the child was recognised after the age of seven. This proof must be furnished by means of a DNA report from an accredited institute from which it follows, with a likelihood of more than 99.99%, that the recognised child is the man's genetic child.³⁰⁴ This leads to the conclusion that only once legal parenthood is established in favour of a Dutch national parent will nationality be established.

3.7.5 *Birth registration and records*

Every child born in the Netherlands must be registered at the nearest Municipal Population Affairs Office within three days of birth. There are penalties for failing to comply with the rules on birth registration in the Netherlands, including, for example, misrepresenting to the authorities who are/is the legal parent(s) of a child. Article 236 of the Dutch Criminal Code provides a penalty of a custodial sentence (a maximum of five years) or a fine. The Registrar of Births, Deaths, Marriages and Registered Partnerships (or certain Dutch Embassies) will register the birth and draw up a birth certificate. The child's registration includes information on the given name(s) and surname of each parent and the place and date of birth of each parent.

It has been considered above that in instances of inter-country surrogacy upon returning to the Netherlands with the surrogate-born child, the intending parents may be in the possession of a birth certificate with both their names listed as the child's parents (as an amended or original birth certificate with a judgment of parentage), they may return with a birth certificate that lists the surrogate mother and the intending father on the birth certificate (an original birth certificate), or they may return with an adoption order in one or both of their names (judicial adoption order).

A tentative conclusion is that in those cases where the relevant national authority is aware of the surrogacy, the fact that the child was born of a surrogate is likely to be documented in the national birth records. When the intending mother's application to adopt the child is approved, her name will be entered onto the register as the child's legal mother

303 See for an overview of the Dutch rules on nationality the country profile submitted to EUDO Citizenship database by R. Van Oers *et al.*, last update January 2013, available at: <<http://eudo-citizenship.eu/country-profiles/?country=Netherlands>>.

304 According de Groot and Vonk, this requirement is untenable in light of the judgment in *Genovese v. Malta*; see R. de Groot and O. Vonk, 'Non-discriminatory Access to the Nationality of the Father Protected by ECHR. A Comment on *Genovese v. Malta* (European Court of Human Rights 11 October 2011)' EUDO citizenship policy briefs, 2012.

but it remains clear that she is also the adoptive mother. The information that the child has another birth mother remains on the register. It would seem that the child may later access the data if he or she so chooses.

3.7.6 National considerations

As discussed above, commercial surrogacy and the unlawful placement of children are undesirable. Various measures have been created to combat both situations, but surrogacy itself is not a criminal offence. The best interests of the child play an important role in this respect, both at a micro-level (the individual child concerned) as well as at a macro-level (prevention of the commercialisation of a baby, the surrogate and child-trafficking for family formation purposes). The interests of the surrogate and the intending parents are also relevant in these policy decisions. Despite the general tolerance, the *mater certa semper est* rule remains fundamental to Dutch public policy, and if the foreign judgment or act interferes with this rule in that there is no mention of the surrogate, the case law, read together, leads to the conclusions that the decision or the act will not be recognised.

An important additional conclusion is that both Dutch substantive law and Dutch PIL provide no clear or certain answers with respect to many questions surrounding surrogacy. The following points emerge as of particular importance. While criminal law contains a number of provisions specifically related to surrogacy, no clear distinction has been drawn in Dutch law between altruistic and commercial surrogacy. Moreover, it seems that distinctions are being drawn between different cases depending upon the genetic relationship between the intending parents and the child. Accordingly, the position of a child born by means of surrogacy is legally unclear, and uncertainty exists with respect to the legal status of the intending parents and the surrogate (and her husband) at birth.

Against this background, Fred Teeven, the Dutch Minister of Justice, proposed the following measures, which, to date, are yet to be debated or considered for legislative adoption or development:

[...] [T]he Secretary of State considers it necessary to try to tackle the problematic points in advance of any [global] treaty response and has proposed the following measures:

1. Surrogacy abroad should be accepted if at least one (as opposed to two as is presently the case) of the intending parents is genetically related to the child and the other genetic contributor is known. This also applies to low technological surrogacy. If neither of the intending parents is genetically related then the path of inter-country adoption must be taken.

2. It is suggested that cases of international surrogacy should be considered in the context of Article 7 Convention on the Rights of the Child. A child has, insofar as possible, the right to know his/her parents. In the Netherlands this is enforced by: Law Donor details artificial insemination (*Wet donorgegevens kunstmatige bevruchting*), hence this should also be applied to international situations.

3. In addition to the above [...] payments to a surrogate mother by the intending parents should not be considered a criminal act. [...] the currently required 'not for profit' notion is too difficult to establish in the international perspective.³⁰⁵

Regarding inter-country surrogacy, it appears that the intention is to accept the Dutch intending parents as legal parents if one of the intending parents is genetically related to the child (i.e., one of them has either contributed the egg or the sperm). The Secretary of State stressed that the rights of the child to know his or her origins as expressed in Article 7 CRC also need to be taken into account in cases of surrogacy. In practice, this would mean that the identity of the egg and/or sperm donors involved in the surrogacy will need to be traceable for the child. Presumably, this would also apply to the surrogate mother who does not provide the egg.

On 21 February 2014, the Dutch Government announced that it will establish a committee to re-evaluate Dutch laws relating to parenthood.³⁰⁶ Over the next two years, a national commission will be examining issues associated with legal parenthood, multiple parenthood, multiple parental responsibility, and surrogate motherhood. The cabinet set up the commission at the suggestion of the State Secretary for Security and Justice. The commission is expected to publish its findings on 1 March 2016.³⁰⁷

305 In a letter from the Secretary of State for Health and Justice to the Chairman of the Dutch House of Representatives (2011-2012), Teeven; English translation provided by author.

306 See comments of M. Vonk at <<http://leidenlawblog.nl/articles/dutch-committee-of-state-to-recalibrate-parenthood-a-broad-and-challenging>>.

307 See press release at <www.government.nl/news/2014/02/21/government-sets-up-national-commission-to-review-parenthood.html>.

A JURISDICTION WHICH IS PERMISSIVE IN ITS APPROACH TO SURROGACY

3.8 UNITED KINGDOM³⁰⁸3.8.1 Overview of the domestic approach to surrogacy³⁰⁹

UK law recognises that surrogacy (and assisted reproduction more broadly) requires its own rules and legal framework, which are separate from child and adoption law and with quite different underpinning principles and aims. Surrogacy is legal in the UK albeit subject to strict legislative requirements and, as discussed below, judicial and state oversight.

Existing UK legislation covering surrogacy arrangements includes the Surrogacy Arrangements Act 1985³¹⁰ (hereinafter, the '1985 Act'), Adoption and Children Act 2002, the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, the Human Fertilisation and Embryology Act 2008³¹¹ (hereinafter the 'HFEA 2008'), and a number of statutory instruments including the Human Fertilisation and Embryology (Parental Order) Regulations 2010.³¹² These legislative acts and instruments are based (in part) on the conclusions of the 1984 Warnock Report.³¹³

308 In the UK, there are three separate legal systems: the law of England and Wales, the law of Scotland, and the law of Northern Ireland. This is an overview of surrogacy in the UK. While HFEA 2008 is a UK-wide legislative instrument, and it is correct to refer to the UK (and UK law) here. However, reflecting national autonomy, there are differences in the official registration documents issued in the constituent nations of the UK. As such, particular attention is given to the approach in England and Wales.

309 The author is grateful to and acknowledges his discussions with Anna Worwood of Pennington Manches LLP. For a consideration of the UK's approach to surrogacy, see the thorough work of English solicitor Natalie Gamble, a leading expert in the field of surrogacy and assisted reproduction available at: <http://www.nataliegambleassociates.co.uk/page/surrogacy-law/22/>. This overview draws partly upon the author's participation at the Aberdeen Workshop and his chapter contribution on the 'National Report of the United Kingdom' in K. Trimmings and P. Beaumont *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 23.

310 The 1985 Act is available at: www.legislation.gov.uk/ukpga/1985/49. Note that there are two versions to this Act, one version extends to England and Wales and Northern Ireland only; another has been created for Scotland only. With respect to the former, section 1(2) reads: 'surrogate mother' means a woman who carries a child in pursuance of an arrangement - (a) made before she began to carry the child, and (b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons; with respect to Scotland, reference is given to 'parental rights being exercised' as opposed to 'parental responsibility'.

311 The majority of its provisions came into force in October 2009, with the provisions relating to parenthood in April 2009. HFEA 2008 is an amending piece of legislation, amending the Human Fertilisation and Embryology Act 1990.

312 The 2010 Regulations ensure that the policy in relation to parental orders is closely aligned with up to date adoption legislation by applying the Adoption and Children Act 2002, the Adoption and Children (Scotland) Act 2007 and the Adoption (Northern Ireland) Order 1987, with modifications, to parental orders.

313 *Report of the Committee of Enquiry into Human Fertilisation and Embryology 1984* (known as the 'Warnock Report') available at: www.hfea.gov.uk/2068.html. See also *Surrogacy: Review for health ministers of current*

The Human Fertilisation and Embryology Act 1990 (updated by HFEA 2008) was the first piece of legislation in the UK to introduce a comprehensive regulatory framework for fertility treatment and embryo research. Its main focus was to regulate the third parties involved in assisted reproduction (via the Human Fertilisation and Embryology Authority (HFEA)) in order to ensure safety and satisfy and promote agreed ethical and policy principles. The HFEA 1990 was substantially amended by the HFEA 2008 in line not only with the scientific developments but also the significant evolution in public perception and attitudes; for example, the change in the intervening years in society's attitude as to whether it was right for treatment to be offered to same-sex female couples or to single individuals led to an amendment such that the words 'need for a father' were removed from section 13(5) HFEA 2008 and the words 'supportive parenting' were substituted in their place. Critically, the requirement for a consideration of the resulting child's welfare remained in place. Guidance on the proper approach to the welfare requirement is found in Part 8 HFEA Code of Practice 8th Edition.

In addition to HFEA 2008 and the HFEA Regulations, the HFEA issues Directions³¹⁴ and a Code of Practice.³¹⁵ The HFEA guidance notes that are particularly relevant to parenthood following surrogacy arrangements are Guidance Note 6 (Legal parenthood), Guidance Note 8 (Welfare of the Child), and Guidance Note 14 (Surrogacy).

The Warnock Committee took the view that although surrogacy arrangements were to be discouraged, where they did take place, there could be no question of the surrogate being forced by any contractual obligation to give up that child. As such, UK law does not recognise surrogacy as a binding agreement on either party. It is also illegal to advertise³¹⁶ for surrogates or intending parents. Among the guiding principles underpinning the legislation is the rule that no money other than 'reasonable expenses' should be paid to the surrogate; however, there is no strict definition as what constitutes 'reasonable expenses'.

arrangements for payments and regulation 1998 (known as the 'Brazier Report') available at: <www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_4009697>.

314 Directions have been issued on the following topics (the direction name, below, is preceded by the reference number of the direction in question): 0000 – Revocation of Directions; 0001 – Gamete and Embryo donation – version 3; 0002 – Recording and providing information to the HFEA under a research licence – version 2; 0003 – Multiple Births – version 4; 0004 – Bringing into force the Code of Practice; 0005 – Collecting and recording information for the HFEA – version 2; 0006 – Import and export of gametes and embryos – version 3; 0007 – Consent – version 3; 0008 – Information to be submitted to the HFEA as part of the licensing process – version 3; 0009 – Keeping gametes and embryos in the course of carriage between premises; 0010 – Satellite and Transport IVF; 0011 – Reporting adverse incidents and near misses – version 2; 0012 – Retention of records – version 2. Directions are available from the HFEA's website.

315 The Human Fertilisation and Embryology Authority, *Code of Practice* 8th edition (First Published 2009. Revised April 2010, April 2011, October 2011, April 2012).

316 The relevant provisions of HFEA 2008 are dealt with in this chapter.

Academic and practitioner commentary³¹⁷ together with judicial intervention have begun to analyse increasingly the effect of the UK's law and approach to surrogacy. In doing so, it can be observed that UK law supports surrogacy if it fits a model deemed acceptable: purportedly altruistic,³¹⁸ consenting, and privately arranged. What appears is the complexity of domestic and international surrogacy matters, with the cases serving as 'cautionary tales,'³¹⁹ highlighting the legal, emotional, and the financial consequences of surrogacy arrangements.

3.8.2 *Legal parenthood in the context of surrogacy*

The arrangements for conferring legal parenthood under the HFEA 2008 depend upon mutual compliance by the parties and the relevant clinic with a range of legal duties and procedural requirements; these are underpinned by core regulatory principles applying to licensed centres carrying out activities under HFEA 2008. One of the more important duties on a licensed clinic is to ensure that patients are given sufficient, accessible, and up-to-date information to enable them to make informed decisions about the significant steps as to treatment and parentage which they take. The licensed clinic is required further to ensure that all patients have provided all relevant consents before carrying out any licensed activity. Unsurprisingly there was, and is, a complementary obligation on the clinics to maintain accurate records and information.³²⁰

Under both HFEA 1990 and HFEA 2008, not only must a resulting child's welfare be considered, but also, it is a condition of the granting of a treatment license to a fertility clinic in the UK that a woman shall not be treated unless she and any partner who are being treated together have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps and have been provided with such relevant information as is proper. The accompanying 8th Code of Practice, Part 3, specifically refers to counselling being provided at every stage of the treatment process by a qualified counsellor.

317 N. Gamble and L. Ghevaert, 'International Surrogacy: Payments, Public Policy and Media Hype' [2011] Family Law 41 504-507; A. Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers' Rights' [2008] 16 Feminist Legal Studies 141.

318 To quote the *Impact Assessment of the Human Fertilisation and Embryology (Parental Order) Regulations 2010* (January 2010; on file with author): 'Surrogacy can provide a vital opportunity, where a woman is unable to bear a child herself, for a couple to have a child that is genetically related to one or both of them.'

319 Quoting McFarlane J, in *Re G (Surrogacy: Foreign Domicile)* 2007 EWHC 2814, at para. 4.

320 See *Re E & F (Assisted Reproduction: Parent)* [2013] EWHC 1418 (Fam). Cobb J: 'This judgment discusses the serious implications for the patients, and the children born to those patients, when the legal duties, procedural requirements and regulatory principles are not observed rigorously. Had they been so applied, when the parties to this case had purported to achieve the grant of 'parental' status to the 'second woman', a great deal of distress, and this part of this litigation, would almost certainly have been avoided.'

(a) The grounds for legal maternity

Under UK law, the woman who carries a child is the legal mother. At common law, motherhood is established through birth. The maxim *mater est quam gestatio demonstrat* has traditionally been the legal standard for determining maternity. Authority for this is the decision in *The Amphill Peerage*,³²¹ which concerned, *inter alia*, the claim to the British peerage title Baron Amphil. Here, Lord Simon stated that '[m]otherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition.'³²² With the advent of HFEA in 1990, the common law presumption of maternity also became the legal (statutory) standard for establishing maternity following ART.³²³ The rules for establishing legal parenthood following ART are set out in the parenthood provisions contained in Part Two of HFEA 2008. Section 33(1) HFEA 2008 provides the meaning of the term 'mother'. Here, it provides that '[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.' The effect of this is that the surrogate mother will be the legal mother of the child at birth irrespective of whether she is genetically connected to the child or not or whether the surrogacy took place in the UK or elsewhere. Moreover, HFEA 2008 makes it clear that a woman does not – and in fact cannot – acquire legal parental status merely because she has donated her egg.

Since HFEA 1990, it is clear that the woman who carries and gives birth to the child – and no other woman – is to be regarded as the mother of the child; a commissioning mother cannot therefore be recognised as the legal mother of a surrogate-born child at the time of the child's birth. As already established, it makes no difference if she is also the genetic mother; for the purposes of the Act, she is regarded as a donor and has the same status as a commissioning mother who has no genetic connection to the child.

If the commissioning mother is unable to acquire legal parental status by way of a parental order (discussed below), made together with the commissioning father, she may be eligible to apply for an adoption order.

(b) The grounds for legal paternity or parenthood of the second parent

Historically, establishing paternity at common law has been much more difficult than establishing maternity. The law resorted to presumptions. The husband of a married woman, for example, is presumed by law to be the father of any child born to the wife during the marriage. The only way this presumption of paternity could be rebutted was if it was established beyond reasonable doubt that the woman's husband could not have been the father. While paternity is still presumed in the situations above, the importance of

321 [1977] AC 547.

322 *The Amphill Peerage* [1977] AC 547 at 577.

323 That is, by section 27 HFEA 1990. When section 27 was repealed by section 33(1) HFEA 2008, the wording contained in the Act's definition of mother remained the same.

these presumptions has been reduced as the development of scientific tests has made it possible to establish paternity with certainty.

In addition to the common law presumptions, there are statutory provisions which apply for the determination of fatherhood following ART. These statutory fatherhood provisions – like the statutory rules on maternity, as mentioned above – can be found in Part Two of HFEA 2008.

In relation to a child conceived as a result of treatment with donor sperm by a married woman, her husband will be treated as the child's father, unless it is shown that he did not consent to his wife's treatment.³²⁴ This provision (and others which operate to determine legal parenthood) is subject to the common law presumption that a child is the legitimate child of a married couple.³²⁵ This means that the commissioning father has no automatic claim to legal parenthood even if he is the genetic father.

If the surrogate is in a civil partnership at the time of treatment, then her partner will be treated as a parent of the child, unless it can be shown that she did not consent to the treatment.³²⁶ It is possible therefore for two male or female partners to achieve the status of parent with respect to a child born by means of a surrogacy arrangement. For female same-sex couples (regardless of their civil partnership status) who require the use of a surrogate to carry the embryo, then section 33 HFEA 2008 still applies and the surrogate is the legal mother. An application must then be made by the commissioning couple for an adoption order or parental order. For those female same-sex couples unable to use their own ova, an application could not be made for a parental order as section 54 HFEA 2008 requires that at least one of the applicants has a genetic connection to the child. They would therefore have to apply for an adoption order (if, as discussed below, they are eligible to do so). This would apply equally to male same-sex couple who use both a sperm (and egg) donor(s) and a surrogate and therefore have no genetic connection to the child.³²⁷

If the surrogate is unmarried (or it is proven her husband or civil partner has not consented to the treatment), the male commissioning parent may be treated as the legal parent at birth if the child is created using his sperm. In contrast, a sperm donor could not be the father provided sperm is donated to a licensed clinic and his sperm is used in accordance with his consent.³²⁸ Where the female commissioning parent's eggs are used but not the male, the surrogate will be the child's only legal parent.

324 Section 35 HFEA 2008. Reflecting the maxim *pater est quem nuptiae demonstrant*.

325 Sections 35 and 38 HFEA 2008.

326 Section 42 HFEA 2008.

327 Section 54 HFEA 2008.

328 Section 41 HFEA 2008 provides: 'Persons not to be treated as father: (1) Where the sperm of a man who had given such consent as is required by para. 5 of Schedule 3 to the 1990 Act (consent to use of gametes for purposes of treatment services or non-medical fertility services) was used for a purpose for which such consent was required, he is not to be treated as the father of the child; (2) Where the sperm of a man, or an embryo the creation of which was brought about with his sperm, was used after his death, he is not, subject

Presumptions of parenthood can be rebutted in court on the balance of probabilities.³²⁹ This might occur where a declaration of paternity is sought³³⁰ or within a contested case over child maintenance or child care. In such cases, the court may give a direction for genetic tests to assist in its determination.³³¹ A DNA sample can be taken from a child without parental consent where the court considers that it would be in the child's best interests for the sample to be taken.³³² The English courts have generally held that the use of genetic testing to establish parentage is in the best interests of children.³³³ Where an adult has refused to take a DNA test, the court may draw inferences from the other evidence available before the court.³³⁴

The commissioning genetic father is therefore able to acquire legal parental status from the moment of birth. In other circumstances, a parental order (together with the commissioning mother) or adoption order is required.

To conclude, it is therefore possible for a child born of surrogacy to have at birth (a) only one legal parent who may or may not be genetically linked; (b) two legal parents who have no genetic connection to the child; (c) two legal parents both of whom may be female, male, or one of whom may be genetically linked to the child. In conclusion, there are few situations in which commissioning parents in the UK are able to have their legal parental status established already at the time of the surrogate-born child's birth. In most cases, parenthood will have to be transferred from the surrogate mother and, where relevant, her partner to the commissioning parents.

The English Courts, in particular, have had to consider the topic of parenthood not only in the context of surrogacy but also, more broadly, following the use of IVF or AID procedures. In *T v. B*,³³⁵ the English Court had to consider the question of who was a parent in the context of a same-sex civil partnership. The Court held that, as a matter of statutory interpretation, the word 'parent' meant 'legal' parent. The Court had no discretion to decide that a person should in the circumstances of a particular case be treated as a parent and thereby potentially have financial obligations imposed. Accordingly, the respondent, the former (same-sex) partner of the mother of a child, who had assumed parental responsibility for the child flowing from a previous grant to her of an order for shared

to section 39, to be treated as the father of the child; (3) Subsection (2) applies whether W was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination.'

329 Section 26 Family Law Reform Act 1969; *S v. S* [1972] AC 24.

330 Section 55A Family Law Act 1986.

331 Section 20 Family Law Reform Act 1969.

332 Section 21(3)(b) Family Law Reform Act 1969.

333 *S v. S* [1972] AC 24; *re H and A (paternity: blood tests)* [2002] EWCA Civ 383. *See contra* *Re K* [1999] 2 FLR 280; *Re D* [2006] EWHC 3545 (Fam); *Re L* [2009] EWCA Civ 1239; J. Fortin, 'Children's Right to Know Their Origins – Too Far, Too Fast?' [2009] 21 CFLQ 336-355.

334 *F v. Child Support Act* [1999] 2 FLR 244.

335 [2010] EWHC 1444 (Fam).

residence, was not the 'legal' parent of the child and no order for financial relief could be made against her. These comments are enlightening in that they reflect a tension between legal and social parents and serve as a reminder of the vulnerability children born of surrogacy may encounter.

(c) **Conflict of law rules**

As stated above, the English Courts will apply *lex fori* (English law) to the question of parentage regardless of where the child was conceived or born. This means that where a child has been conceived abroad using a foreign sperm donor,³³⁶ the husband or civil partner of the gestational mother will be considered in English law to be the second legal parent under section 35 HFEA 2008. However, if the spouse or civil partner did not give consent to the use of the donor sperm in such circumstances, he or she will not be considered the legal parent under section 35 HFEA 2008. In such a case, the foreign sperm donor may be considered to be the second legal parent. This is because the donor sperm used may not have been donated in accordance with the conditions of the HFEA. For example, in *U v. W*,³³⁷ where an unmarried couple underwent assisted reproduction using donor sperm in Italy, the Court noted that the anonymous sperm donor could have been considered the legal father, as consent within the meaning of HFEA 1990 (then applicable) had not been given.³³⁸

The rules establishing legal parenthood under the HFEA are technical and complicated. As there is no provision in the HFEA to recognise foreign rules of legal parentage, where intending parents go abroad for artificial reproductive treatments, they need to be careful that the parent-child link that they intend to create will be recognised by English law. English law therefore does not have choice of law rules concerning parentage or surrogacy. Since English Courts are not confronted with foreign law in matters concerning parentage, they, in theory, do not need the public policy exception to avoid the application of foreign law that violates fundamental principles of English law. Three causes have been put forward to explain this situation: parentage is to a large extent a matter of fact, most issues concerning the determination of facts are characterised as procedural issues instead of substantive issues and therefore governed by the *lex fori* and the jurisdiction of the English Courts to determine legal parentage or to render a parental order, and this depends to a large extent on the domicile of the parties which is one of the most important connecting factors for personal status.

³³⁶ Even in the field of regulated fertility treatment, there are clear examples of difficulties: laboratory error (*Leeds Teaching Hospitals NHS Trust v. A* [2003] 1 FLR 1091; incorrect clinic procedure (*Re E & F* [2013] EWHC 1418 (Fam)); deception (*Re R (a Child)(IVF: Paternity of Child)* [2005] 2 AC 621). Codes of Practice in the UK limit the number of times a person can donate sperm: in this country, a donor can normally donate to a maximum of ten families (see HFEA donation policy).

³³⁷ *U v. W* (*Attorney General intervening*) [1997] 2 FLR 282.

³³⁸ *Ibid.*, 292.

(d) Recognition of legal parentage in foreign judgments

It should also be noted that English law does not have statutory rules on the recognition of foreign judgments on parentage. The leading case on the recognition in England of foreign orders concerning parental status is *Re Valentine's Settlement*.³³⁹ The case concerned an adoption order made in South Africa in respect of a child living there at the time by a British subject domiciled in the then Southern Rhodesia. The following principles can be drawn from the case:

- i. A foreign order must be valid in the country where it is made.
- ii. The child must have been resident in the country where it was made, so that that country had jurisdiction to make the order.
- iii. The order will only be recognised in English law if it conforms to some similar concept in English law.
- iv. It will only be recognised in English law if it is not contrary to public policy to do so. In particular, the country where it was made must apply the same safeguards that the English Courts do.
- v. The order will have the same effect in English law as such an order made in England. The English Court will not apply the law of the country which made the order. The order must, therefore, have some English equivalent.

The more controversial principle established by the majority of the Court was that the adoptive parents must have been domiciled in the country where the order was made. This case has been considered in a number of High Court decisions. In *D v. D (Foreign Adoption)*,³⁴⁰ Mr. Justice Ryder considered an Indian adoption order and whether the local safeguards were sufficient for recognition. The Court did not require the same procedures and safeguards to be followed as under English law, provided that they were rigorous and directed to the best interests of the child and had actually been followed. In weighing public policy considerations, the Court considered the best interests of the child, which were clearly served by recognition of the adoption and the family's rights under Article 8 ECHR. In *A Council v. M and others (No.4) (Foreign Adoption: Refusal of Recognition)*,³⁴¹ Mr. Justice Jackson gave primacy to the best interests of the child, and, in that case, this led to the adoption not being recognised.

Section 66(1) Adoption and Children Act 2002 provides for the automatic recognition of foreign adoption orders without the need for any English order. It is an offence under section 83 Adoption and Children Act 2002 to bring a child into the UK for the purpose of adoption or within 12 months of a foreign adoption. (Hague Adoption Convention

³³⁹ [1965] 1 Ch 831.

³⁴⁰ [2008] EWHC 403 (Fam).

³⁴¹ [2013] EWHC 1501 (Fam).

adoptions are exempted.) It is also an offence under section 95 to pay parents to adopt their child. This makes it impractical and, in most cases, seemingly impossible to use foreign adoption as a way to regularise foreign commercial surrogacies.

3.8.3 *Legal requirements on a surrogate and the commissioning parents*

The 1985 Act (as amended) defines ‘surrogate mother’ and ‘surrogacy arrangement’ and places restrictions on the conduct and arrangement of surrogacy in the UK. HFEA 2008 dictates parenthood in assisted reproduction situations (including surrogacy) and made the rules on parental orders, which were specifically designed for surrogacy. With the legal parent(s)’s consent, parenthood, since 1994, can be transferred to the commissioning couple by means of a parental order.³⁴² A parental order has transformative effect and, if granted, is of like effect to an adoption order with the consequence that the child is for all purposes treated in law as a child of the couple and not of any other person.³⁴³ The provisions apply whether the surrogate is in the UK or elsewhere at the time of placing in her the embryo or the sperm and eggs or her artificial insemination and delivery. Intending parents can apply to the High Court for a parental order provided the specified conditions set out in section 54 HFEA are met:

- i. Both commissioning partners apply³⁴⁴;
- ii. At least one of the commissioning parents must be a genetic parent of the child³⁴⁵;
- iii. The commissioning partners must be (a) husband and wife, (b) civil partners of each other, or (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other³⁴⁶;
- iv. The application is made more than six weeks and less than six months after the birth³⁴⁷;
- v. At the time of the application and the making of the order, the child’s home is with the commissioning parents³⁴⁸;

³⁴² Section 54 HFEA 2008.

³⁴³ Section 67 of the ACA 2002 (concerning the effect of an adoption order) is applied to parental orders by Schedule 1 to the 2010 Regulations and provides: A person who is the subject of a parental order is to be treated in law as if born as the child of the persons who obtained the order. A person who is the subject of a parental order is the legitimate child of the persons who obtained the order and is to be treated as the child of the relationship of those persons. A person who is the subject of a parental order is to be treated in law as not being the child of any person other than the persons who obtained the order.

³⁴⁴ Section 54(1) HFEA 2008. An application for a parental order is made by means of Form C51 (in England and Wales) and Form 22 (in Scotland).

³⁴⁵ Sections 54(1)(a) and (b) HFEA 2008.

³⁴⁶ Section 54(2) HFEA 2008.

³⁴⁷ Section 54(3) HFEA 2008.

³⁴⁸ Section 54(4)(a) HFEA 2008.

- vi. At the time of the application and the making of the order, either or both of the applicants must be domiciled in the UK or in the Channel Islands or in the Isle of Man³⁴⁹;
- vii. At the time of making the order, both applicants must have attained the age of 18³⁵⁰;
- viii. The applicants can satisfy the court that the surrogate mother, who carried the child and any other person who is a parent of the child, but is not one of the applicants, has freely and with full understanding of what is involved agreed unconditionally to the making of the parental order. Such consent may be given only once the child has reached six weeks old;³⁵¹
- ix. No money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of (a) the making of the parental order, (b) any agreement required, (c) the handing over of the child or (d) the making of any arrangements with a view to the making of the order, *unless authorised by the court* [Emphasis added, MWG], (together the 'section 54 conditions').

In other words, provided each of the section 54 conditions is met, a UK court is enabled to order that the commissioning couple are to be treated in law as the parents. If any of the conditions listed above cannot be satisfied then, on a strict reading of the statutory conditions, it will not be possible to obtain a parental order. This might apply, for example, if the commissioning parents have no genetic link with the child or if the commissioning parent is single. Securing the position of the commissioning parents may then be difficult and will involve an application to the court for adoption, special guardianship, or a child arrangements order.

A court considering an application for a parental order will be assisted by a detailed written report from a specialised guardian, known as a Parental Order Reporter (POR). At present, the guidance issued to local authorities and health authorities is contained in circular LAC (94)25.³⁵² The guidance requires local authority social services to make enquiries when they are aware that a child has been, or is about to be, born as a result of a surrogacy arrangement. The POR's primary areas of investigation appear to be in respect of welfare, consent, and commerciality. The POR is required to consider the circumstances in which the consent of the surrogate and (as appropriate) that of the father were obtained. The POR guardian must make an enquiry into and assessment of whether the expenses

349 Section 54(4)(b) HFEA 2008.

350 Section 54(5) HFEA 2008.

351 Section 54(6) HFEA. The consent (or opposition) to a Parental Order is made by means of Form C52 (in England and Wales) and Form 23 (in Scotland).

352 Available at: <www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/LocalAuthorityCirculars/All-LocalAuthority/DH_4004636>.

met by the commissioning couple were reasonably incurred and if unable to do this must be explained.

While it is beyond the scope of this chapter to delve fully into the history of surrogacy and each of the section 54 conditions, what follows is a brief sketch of the principle conditions.

Applicants

Whereas HFEA 1990 only provided for cases in which the commissioning couple were married, HFEA 2008 is more expansive. Since 6 April 2010, civil partners (two people of the same-sex registered in a civil partnership³⁵³) and two persons living as partners in an enduring family relationship are also able to apply for a parental order. A single person remains unable to apply for a parental order.³⁵⁴ However, it has been reported in the media that an individual (a single male adult), wishing to conceive through a surrogacy arrangement in the UK, has sought to challenge this limitation.³⁵⁵

UK domicile

In *Re G (Surrogacy: Foreign Domicile)*,³⁵⁶ Mr. Justice McFarlane found himself unable to make a parental order as it transpired that neither of the commissioning parents were domiciled in the UK.³⁵⁷ The UK concept of domicile is very different from the concept as it is used and understood in other countries (which is generally based on habitual residence). A person is generally domiciled in the country in which he is considered to have his permanent home.³⁵⁸ *Re G* involved a Turkish couple who came to England, where a baby was conceived by way of a surrogacy arrangement made between the couple and surrogate mother. It took nine months of litigation to find an alternative solution to a parental order (which was not available as neither commissioning parent was domiciled in a part of the

353 Civil Partnership Act 2004, section 3(1)(d) and Sch. 1 pt 1, as applied to parental orders by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 Sch. 4 para.18.

354 However, in the unusual circumstances that prevailed in *A & A v. P, P & B* [2011] EWHC 1738 (Fam) (discussed in this chapter), Theis J held that the Court had jurisdiction to make a parental order in favour of a married couple, after the death of the husband.

355 Reported in the *The Daily Mail* on 8 November 2012 available at: <www.dailymail.co.uk/news/article-2229691/Supermarket-worker-24-legal-bid-Britains-single-father-using-surrogate.html>.

356 [2007] EWHC 2814.

357 See *Mark v. Mark* [2005] UKHL 42, [2006] 1 AC 98 [38] (Baroness Hale of Richmond) (noting *obiter* that domicile is the sole basis of jurisdiction to make a parental order under section 30 HFEA 1990 now section 54 HFEA 2008).

358 Dicey, Morris and Collins, *The Conflict of Laws* (14th ed. with 4th supplement, Stevens 1987) (see, in particular, paras. 6-030 to 6-048). It should also be noted that a person is domiciled in a jurisdiction rather than in a country. So, in a federal system, an individual is domiciled in a particular state (e.g., in England and Wales or Scotland). The UK concept is unrelated to nationality, residence, or citizenship. Reference here to having a UK domicile is shorthand for having a domicile in any part of the UK.

UK) using international adoption law³⁵⁹ (which entailed a full local authority assessment of the intending parents and expert evidence confirming that the couple would be permitted to adopt in Turkey). The English High Court warned that if others followed this path, coming to the UK for surrogacy as foreign nationals not domiciled in any part of the UK, the Court would impose on them (in addition to their own legal costs) the state's costs for resolving the position. To quote McFarlane:

In the event that any agencies involved in facilitating or advising on surrogacy arrangements are approached by a couple who are not domiciled in the UK, or indeed any solicitor who may be approached by such a couple for legal advice, must advise that pursuant to rule 110 of The Family Procedure (Adoption) Rules 2005 the 'court may at any time make such orders as to costs as it thinks just'. Such orders for costs can be made against the intended non-domicile couple and can include payment of the legal costs of the proceedings [...].³⁶⁰

The criterion of domicile was considered again by the English High Court in *Z and another v. C and another*.³⁶¹ The application for a parental order concerned twins, born in November 2010, who were conceived as a result of a surrogacy agreement between the applicants (a same-sex Israeli couple resident in London) and a clinic in India, arranged through a surrogacy agency in Israel. One of the applicants was the genetic father of the twins. The surrogate mother was Indian and played no active part in the proceedings. The preliminary issue for the court to determine was whether one of the applicants was domiciled in England at the time of the application. After a thorough examination, the Court was persuaded that the assertion of English domicile was genuine and was not a misuse of proceedings or contrived to secure any immigration benefit.

In *Re A and B (surrogacy: domicile)*,³⁶² the High Court awarded legal parenthood to a gay couple who had a child through surrogacy in India. The fathers were an American-Polish couple who had recently moved to the UK, and the Court had to consider whether they met the criteria to be 'domiciled' in part of the UK. The Court was satisfied on the balance of probabilities that both applicants had discharged the burden on them of proving the abandonment of their domicile of origin and the acquisition of a domicile of choice in England and Wales. The judgment was published as guidance on the principles, which will be applied for parents who are UK resident but not originally from the UK.

³⁵⁹ Pursuant to section 84 Adoption and Children Act 2002.

³⁶⁰ Note 18, para. 52(f).

³⁶¹ [2011] EWHC 3181 (Fam).

³⁶² [2013] EWHC 426 (Fam).

What then of English domiciliaries resident outside of one of the UK jurisdictions? The High Court has issued a parental order to a British-French couple living in France in respect of their son born through inter-country surrogacy. The case of *CC v. DD (2014)* makes clear that commissioning parents do not need to live in any part of the UK to apply for a parental order.³⁶³ The case involved a British intending mother and French intending father who conceived through surrogacy in Minnesota, USA. Under UK (and French) law, the US surrogate was the legal mother, and the child was neither British nor French. The intending parents (who had already secured their parentage in the US through a series of orders including a step-parent adoption order in favour of the applicant mother) applied for a parental order to resolve their parentage in the UK. As the parents lived in France, they could only obtain a parental order if the mother retained her English 'domicile'. Mrs. Justice Theis agreed that, because the British mother had a clear intention to return to live in the UK and was tied to France only by her husband, she had not acquired a domicile of choice in France which would have displaced her UK domicile of origin. This decision is likely to be of comfort to expatriate British parents considering surrogacy who wish to secure their UK legal position. The extent to which the parental order is recognised in France is not known.

Non-commercial surrogacy arrangements where neither of the commissioning couple is domiciled in any part of the UK, while not illegal, are to be discouraged on the ground that it will not be open to the intending parents to apply for a parental order with respect to the child.

Consent

The court must be satisfied that both the surrogate and any other person who is a parent of the child but is not one of the applicants have freely, and with full understanding of what is involved, agreed unconditionally to the making of a parental order in favour of the intending parents. In the case of *X & Y (Foreign Surrogacy)*,³⁶⁴ a couple had made a surrogacy arrangement with an Ukrainian woman who gave birth to twins using anonymously donated eggs fertilised by the male applicant's sperm. In deciding the application, Mr. Justice Hedley reviewed the issue of consents required by the surrogate and her husband. The Court found that the Parliament had intended to make particular provision for the married husbands of surrogate mothers who consensually entered into surrogacy arrangements. The intention of Parliament was to recognise the particular relevance of

³⁶³ *CC v. DD* [2014] EWHC 1307 (Fam). Theis J who said that a parental order provides the child with "a British birth certificate confirming his parentage, which better reflects his identity as a child of reproduction rather than an adopted child." The parental order, therefore, better meets the children's 'lifelong' welfare, and involves a whole of life perspective extending, not just forward, but also retrospectively from birth until death.

³⁶⁴ [2008] EWHC 3030 (Fam).

marriage in surrogacy arrangements and, as such, the consent of a surrogate's husband is given unconditionally to the making of the parental order.

In *Re D and L (surrogacy)*,³⁶⁵ the English High Court made a parental order without the surrogate's consent as, on the Court's findings, the surrogate genuinely could not be found and extensive efforts had been made to try to find her. Mr. Justice Baker dispensed with the need to obtain the surrogate mother's consent, on the basis of the children's welfare being the paramount consideration of the Court, and stated that '*[I]t is only when all reasonable steps have been taken to locate her [the surrogate mother] without success that a court is likely to dispense with the need for valid consent.*' The judge also noted:

[A]lthough a consent given before the expiry of six weeks after birth is not valid for the purposes of s54, the court is entitled to take into account evidence that the woman did give consent at earlier times to giving up the baby. The weight attached to such earlier consent is, however, likely to be limited. The courts must be careful not to use such evidence to undermine the legal requirement that consent is only valid if given after six weeks. [...]

In future cases, however, Applicants and their advisors should learn the lessons of this case, and take steps to ensure that clear lines of communication with the surrogate are established before the birth to facilitate the giving of consent after the expiry of the six week period.³⁶⁶

Ratione temporis

Section 30(2) HFEA provides for a time limit of six months from the date of birth for the making of the parental order application. On the face of HFEA 2008, there is no statutory power to extend this time limit. It was recognised in *JP v. LP & Others*³⁶⁷ that the policy and purpose of parental orders are to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement. Yet there are a number of reasons why the time limit may not be met, e.g., where the child is born abroad under a foreign arrangement, immigration difficulties may arise which prevent and delay the child being home with the applicants or the commissioning parents being unaware of the need to apply for a parental order, let alone of the section 54 conditions. In *X (A Child) (Surrogacy: Time Limit)*, the High Court held that there is nothing in the statute to preclude the Court from making an order merely because the application is made after the expiration of the six-month period.³⁶⁸ The statute must be 'read down' in such a way as to ensure that the essence of the protected right to family and

³⁶⁵ [2012] EWHC 2631 (Fam).

³⁶⁶ *Ibid.*, 22.

³⁶⁷ [2014] EWHC 595 (Fam) at para. 30.

³⁶⁸ [2014] EWHC 3135 (Fam).

private life (Article 8 ECHR) is not impaired and that what is being protected are rights that are ‘*practical and effective and not “theoretical and illusory”*’.³⁶⁹

The case of *JP v. LP & Others* concerned a High Court application under the Children Act 1989 and the inherent jurisdiction, arising out of the need to regularise the status of parties following the making of an informal surrogacy arrangement. A child, CP, was born as result of an informal partial surrogacy arrangement. None of the parties had prior legal advice or counselling. The surrogate (a close friend of those seeking to be parents) became pregnant following insemination with the genetic father’s gametes. The hospital at which CP was to be born asked the parties to provide a ‘surrogacy agreement’. Three months after CP’s birth, the relationship between the genetic father and his wife broke down. She issued proceedings within which a shared residence order was granted, and the parties undertook to regularise CP’s legal status by applying for a parental order under section 54 HFEA 2008. The application was not lodged until CP was seven and a half months old and was thus beyond the statutory limit of six months from the date of birth. Neither party pursued the application, which was subsequently dismissed. Further difficulties between the mother and father then gave rise to renewed Children Act proceedings, in which (no one having appreciated that the statutory limit had expired) the parents undertook to renew their application for a parental order. The matter was then transferred to the High Court for consideration of how to regularise the status of the adults involved when no parental order could be made. Both the child and surrogate were joined as parties. Giving judgment, Mrs. Justice King noted, in particular, that although HFEA 2008 contained amendments concomitant with changing social attitudes, both the guidance requiring consideration of the child’s welfare and the prohibition on licensed clinics providing treatment in the absence of counselling and information having been provided remained in place. Mrs. Justice King noted the legal positions of each of the adult parties: the surrogate remained the legal mother; the father was both genetic and social father; and the mother, in the absence of legal intervention, had no status other than as ‘psychological’ parent. Neither a parental order nor adoption nor special guardianship orders were options for this family. Adoption was precluded as the mother and father could not adopt jointly as they were no longer in an ‘enduring family relationship,’ and if the mother alone adopted, it would extinguish the father’s parental responsibility. A special guardianship order would not only (properly) exclude the surrogate exercising her parental responsibility but would inappropriately exclude the father doing likewise. While a child arrangements order for residence would provide the commissioning mother with parental responsibility, it would allow both parental responsibility and legal parenthood to be retained by the surrogate and would leave the commissioning mother and the child in vulnerable positions.

³⁶⁹ See the discussion in Chapter Four at 4.11.

In these ‘*wholly exceptional circumstances*’, Mrs. Justice King endorsed a proposal put forward by all parties (the mother and the father having been able – with the help of the Guardian and the benefit of expert legal advice – to set aside their differences). The child was to be made and to remain a ward of court; there was to be a shared residence order, and all issues of parental responsibility were to be delegated to the commissioning mother and father. The surrogate was to be prohibited from exercising her parental responsibility without leave of the court.

This case highlights the real dangers which can arise as a consequence of private ‘partial’ surrogacy arrangements where assistance is not sought at a regulated fertility clinic (or indeed full surrogacy arrangements where the child is born abroad).

Where a parental order cannot be made because the section 54 checklist is not satisfied, the English court will only be able to regulate the child’s parenthood through an adoption order or wardship proceedings to resolve the situation.³⁷⁰ This brings its own difficulties and may not be successful in all surrogacy cases. In *Re MW*,³⁷¹ a couple entered into a surrogacy agreement before the implementation of HFEA 1990. The surrogate mother was impregnated using the intentional father’s sperm. She was to receive £7,500 upon handing over the child as compensation for lost earnings. The child was handed over after birth, and the intending parents applied to adopt the child. The surrogate objected to the adoption as she wanted to maintain contact with the child. Three barriers to the proposed adoption existed under the Adoption Act 1976. Section 11(1) of that Act provided that a person, other than an adoption agency, shall not make arrangements for the adoption of a child or place a child for adoption unless the proposed adopter is a relative of the child. The Court held that there had been a breach of this section but it was not precluded from making an order.³⁷² The payment made to the surrogate breached adoption law. The Court held that it had the power to retroactively authorise the payments.³⁷³ The final problem was that the mother withheld consent. In this case, the Court was willing to override the mother’s consent.³⁷⁴

370 See *JP v. LP & Ors* [2014] EWHC 595 (Fam) and *Re D (A Child)* [2014] EWHC 2121 (Fam). The latter case concerned a young boy called D who was born in 2010. He was born in the Republic of Georgia as a result of a commercial surrogacy arrangement, using eggs from a donor and the intended father’s sperm, which took place at and through a clinic in Georgia. The issue was whether the surrogate mother was married at the relevant time. This is necessary for the purposes of deciding whether, as a matter of English law, the father is the child’s legal father.

371 [1995] 2 FLR 759.

372 *Ibid.*, 763.

373 *Ibid.*, 764.

374 *Ibid.*, 765.

3.8.4 *Enforceability of surrogacy agreements*

It is a strict ground under UK law that a surrogacy agreement is not legally binding – it is unenforceable. Section 1A 1985 Act provides that ‘*no surrogacy arrangement is enforceable by or against any of the persons making it*,’ i.e., surrogacy agreements are unenforceable in the UK courts.³⁷⁵ Two sets of reasons could be invoked in this regard. First, the surrogate mother cannot be required by the intending parents under any contractual provision to hand over the child. Second, legal parenthood can be established only by the means set forth in the law and not by agreement. Thus, the commissioning parents cannot be required to hand over any money or recover any money paid to the surrogate under the terms of such an agreement or take responsibility for the child without a parental order (or other court order). This means that surrogates can (and do, as discussed further below) change their minds and refuse to surrender the child at birth. To further enhance the policy, it is interesting to note that it appears to be an offence under section 2 of the 1985 Act to provide paid legal advice in the UK in respect of a prospective surrogacy arrangement (e.g., to advise on the terms of a particular ‘contract’), including one being made abroad.³⁷⁶

As UK law does not recognise surrogacy as a binding agreement on either party, there is very little that the commissioning parents can do to secure their position prior to the birth, even in the case of gestational surrogacy where the baby is likely to be genetically related to one or both intending parents and not the surrogate. The law is clear. An intending couple cannot apply for a parental order unless the child is already in their care with the consent of the surrogate. Should they apply for a child arrangements order in respect of the child or try to invoke any other form of legal process to compel the surrogate to hand over the child, they are almost inevitably bound to fail. Surrogacy arrangements will not be enforced by the back door. Unless the surrogate is, quite apart from the surrogacy arrangement, entirely unfit to parent the child,³⁷⁷ she is unlikely to be ordered to give up the child.

In determining disputes between the surrogate and the commissioning parents, the courts will look to the child’s welfare needs, the child’s interests being paramount.³⁷⁸ The ensuing court proceedings may be costly, both in terms of legal expenses and emotions. Provided the surrogate has the appropriate parenting skills and that there is a strong and loving attachment between her and the child who is thriving in her care, it will be very

³⁷⁵ Section 1A of the 1985 Act.

³⁷⁶ A firm of solicitors who drafting such an agreement in the UK for a fee was held to have committed the offence in *JP v. LP and others (Surrogacy Arrangement: Wardship)* [2014] EWHC 595 (Fam).

³⁷⁷ The UK court must apply the principles set out in section 1 Children Act 1989. The court’s paramount consideration is a child’s welfare, and the court must have regard in particular to the factors listed in section 1(3) – the so-called welfare checklist – as well as the principles of Article 8 ECHR – the right to respect for family life.

³⁷⁸ Section 1 Children Act 1989.

difficult for commissioning parents to displace that attachment and obtain residence of the child in place of the surrogate, although they may otherwise be able to meet the child's needs. Even where there is alleged deception on the part of the surrogate in entering into the surrogacy arrangement (e.g., that she never intended to go through with it or otherwise deceived them or the court), reprehensible as her conduct may be, the crucial question for the court is what is in the child's best interests. Thus, in *Re TT*,³⁷⁹ the Court ordered that the child should remain with the surrogate mother in whose care she had been since birth five months before and was thriving although the Court was concerned about aspects of her character that may be flawed and might impact upon her parenting, whereas in *Re P (Surrogacy: Residence)*,³⁸⁰ residence of a child was granted to the genetic father where a surrogate lied to two sets of commissioning parents in surrogacy arrangements under which she bore two children using the sperm of the commissioning fathers. During the pregnancies, she told each couple that she had miscarried but then went on to care for the children with her husband, her deceit only coming to light when her eldest child left home and contacted the surrogacy agency. The eldest of the two children was six by the time the case was heard and remained with the surrogate and her husband, but the Court decided that it was in the best interests of the younger child, then 18 months, that he should reside with his genetic father.

Since 2000, there have been only two reported judgments where the English courts have had to untangle disputed surrogacy arrangements. The case of *Re W and B and H (Child Abduction: Surrogacy)*³⁸¹ involved a surrogacy arrangement between an English surrogate and US resident commissioning parents who entered into a binding surrogacy agreement in California. During the pregnancy, the surrogate mother changed her mind and returned to the UK where she gave birth to twins. The Court eventually determined that the babies should be returned to California, following international abduction proceedings brought by the commissioning parents. The case of *Re N (a Child)*³⁸² involved a dispute over a surrogate-born child between the surrogate parents and commissioning parents, where the court eventually awarded care of the then 18-month-old child to the commissioning parents. The outcomes of these cases indicate the wide-ranging and fact-based approach taken by the courts.

In *Re MB*,³⁸³ the principle was established of a competent woman's right to refuse any medical or surgical treatment needed by a foetus, even if the consequence may be the death

379 [2011] EWHC 33 (Fam). The author is grateful to Barbara Connolly QC for bringing this judgment to his attention.

380 [2008] 1 FLR 177, upheld on appeal, *re P (Residence: Appeal)* [2007] EWCA Civ 1053.

381 *In the Matter of W and W v. H (Child Abduction: Surrogacy)* No 2 [2002] 2 FLR 252.

382 *In the Matter of N (a Child)* [2007] EWCA Civ 1053.

383 *MB (Caesarean Section)*, *Re* [1997] 2 F.L.R. 426: whether phobia of needles rendered pregnant woman temporarily incompetent, allowing court to order forced caesarean.

or serious handicap of the child she bears. To the author's knowledge, there has been no explicit UK case law considering this principle in the context of surrogacy.³⁸⁴

The surrogate mother also enjoys maternity rights extending after birth (these rights do not extend to the commissioning mother). The commissioning parents may qualify for statutory adoption leave or parental leave. The entitlement of an employee on maternity leave to be paid and other benefits is governed by a number of different pieces of legislation.³⁸⁵

3.8.5 *Payments in surrogacy*

Commercial surrogacy is not permitted in the UK, and anyone within the UK who negotiates a surrogacy agreement between a surrogate and commissioning parents on a commercial basis is guilty of a summary criminal offence.³⁸⁶ Currently, there is no direct prohibition preventing payments to surrogates for their services. The Warnock Committee considered that the introduction of commercial surrogacy would create a serious risk that women and children would be exploited.³⁸⁷

The prevention of commercial surrogacy is not the only policy concern the court must have in mind when deciding whether or not to make a parental order. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010³⁸⁸ requires the court to consider the child's welfare as a paramount concern when making a parental order.³⁸⁹ This creates a conflict of interest where the court is asked to make a parental order in favour of a couple who have availed themselves of commercial surrogacy services abroad. The court has to weigh up conflicting policy considerations – the welfare of the child and the prevention of commercial surrogacy. In most cases, the courts have reluctantly authorised reasonably high payments to the surrogate, as this is the best way to regularise the child's parentage and is ultimately in the child's best interests.

384 For completeness, reference should be given to *St. George's Healthcare N.H.S. Trust v. S* [1998] 3 W.L.R. 936, in which the Court of Appeal found that a competent adult woman was entitled to refuse a caesarean section even if her decision would lead to the death of a 36-week-old foetus. Judge L.J. said: 'The autonomy of each individual requires continuing protection, particularly when the motive for interfering is as readily understandable, and indeed to many would appear commendable'. He also suggested that 'Pregnancy does not diminish a woman's entitlement to decide whether or not to undergo medical treatment. Her right is not reduced or diminished merely because her decision to exercise her right may appear morally repugnant.'

385 The Equality Act 2010; the Employment Rights Act 1996; the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312); the Social Security Contributions and Benefits Act 1992; the Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960).

386 Surrogacy Arrangements Act 1985.

387 Warnock Report, 'Report of the Committee of Inquiry into Human Fertilisation and Embryology' (Cmd 9314, HMSO. London 1984) 18.18.

388 2010/985.

389 Section 1(2).

The question of payment is a key issue exercising the minds of practitioners and the courts.³⁹⁰ One of the most publicised criteria of surrogacy today is the requirement that no money or other benefit, other than for 'reasonable expenses', has been given to the surrogate mother.³⁹¹ However, commissioning parents are permitted to pay the reasonable expenses of the surrogate, and the court can also authorise additional payments and benefits in certain cases. This means that the UK court has the discretion to retrospectively authorise payments made to the surrogate mother and will do so (and has done so) in appropriate circumstances. The statute affords no guidance as to the basis of any such approval or what 'reasonable expenses' means. It is clearly a policy decision that commercial surrogacy agreements should not be regarded as lawful; equally, there is clearly recognition that, sometimes, there may be reasons to do so. The approach adopted by the court is to treat any payment described as compensation (or some similar word) as *prima facie* being a payment that goes beyond reasonable expenses whereas expenses of the surrogate and her family (for example, clothes, travel expenses, and loss of earnings) may fall within the category of reasonable. It is necessary to emphasise (as comparisons between the USA and Western India graphically illustrate) that no guidance can be gained from conventional capital sums or conventional quantum of expenses. Each case must be scrutinised on its own facts. However, in certain cases, there is a sense that the amounts paid today as 'expenses' involve in reality a payment for services.

In *Re L (A Minor)*,³⁹² the High Court considered a US commercial surrogacy agreement. While the surrogacy agreement the applicants entered into in Illinois (USA) was wholly lawful in that jurisdiction, it was unlawful in the UK *per se* because the payments made by the applicants went beyond reasonable expenses. For the first time, the Court made it clear that the welfare of any child born by means of a surrogacy arrangement will trump public policy on payments. The Parental Order 2010 Regulations³⁹³ import into parental order applications the welfare test,³⁹⁴ with the result that welfare is no longer merely the court's first consideration but becomes its paramount consideration. The effect of the change is that it will only be in the clearest case of the abuse of public policy (such as child trafficking) that the court will be able to withhold an order if, otherwise, welfare considerations support the making of an order.

390 As a legal practitioner, it is almost impossible to give advice on this point.

391 Section 54(8) HFEA 2008.

392 [2010] EWHC 3146.

393 The significant change in HFEA 2008 is the enlargement of the scope of applicants and the welfare test. The effect of 2010 Regulations is to import into section 54 applications the provisions of section 1 of the Adoption and Children Act 2002.

394 The checklist is similar to that under the Children Act 1989 and includes consideration of the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding); the child's particular needs; the child's age, sex, background; and any of the child's characteristics which the court or agency considers relevant, the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant.

In *Re S (Parental Order)*,³⁹⁵ Mr. Justice Hedley dealt with a surrogacy case involving a British married couple who went to California and commissioned a surrogate mother who was implanted with an anonymously donated egg fertilised with the sperm of the British husband. Twins were born, and prior to their birth, the surrogate mother's rights were extinguished according to Californian law and there was a declaration that the British couple would be the lawful parents of the children. The couple applied for a parental order. Significant sums were spent on medical and legal expenses. The outstanding sum paid to the surrogate mother was \$23,000. This sum could not be accounted for fully. The Court accepted that part of the sum was attributable to the expenses of the surrogate mother incurred by reason of the pregnancy but that a significant portion of the sum did go beyond 'reasonable expenses'. Hedley J considered that when evaluating the merits of a case with an international aspect, the court has to be satisfied that the commercial surrogacy arrangements were not used to circumvent child care laws, so that arrangements are approved in favour of individuals who would not have been approved as parents in this country. In addition, the court must be alert to any signs that the payment has meant that the child has effectively been bought or that the payment made, while it may on first appearance seem modest, is not in fact of such substance that it overbore the will of the surrogate.

Once again, the court was faced with the issue of commerciality in *A and A v. P, P and B*.³⁹⁶ The total payments made directly to the surrogate mother were £4,500, approximately. That sum was made up of a combination of payments for loss of earnings, an after delivery charge, and other relatively modest payments. In addition, various payments were made to the clinic in accordance with the agreement which included the cost of accommodation, food, and care at the clinic for the surrogate mother who stayed at the clinic during her pregnancy. Theis J held:

On the information I have it is likely that the payments were more than expenses reasonably incurred. For example, I was told that it was understood the loss of earnings figure was based on two years loss of earnings. There is no evidence in this case of Mr and Mrs A acting in anything other than the utmost good faith, or that the level of payments or the circumstances of the case could be said to have overborne the will of the surrogate mother. In those circumstances I authorise [...] the payments that were made to the surrogate mother in accordance with the agreement.³⁹⁷

³⁹⁵ [2010] 1 FLR 1156.

³⁹⁶ [2011] EWHC 1738 (Fam).

³⁹⁷ *Ibid.*, 34.

In *Re X and Y (Children)*,³⁹⁸ the applicants, Mr. and Mrs. A, entered into surrogacy agreements with two women in India who had been contacted via a company at a fertility clinic in New Delhi (India). The company was responsible for finding surrogates who had already given birth to a child. The applicants were advised to use two surrogate mothers to increase the chance of a successful birth. The applicants did not consult legal advice in the UK before they travelled to India. The women gave birth to X (a boy) and Y (a girl). Mr. A was the children's genetic father, whose sperm fertilised the egg of an anonymous egg donor. The surrogacy company drew up agreements, which concerned the surrogacy arrangement and financial terms. The first part provided for the applicants to be the sole carers of the children and for the surrogate mothers to renounce all legal rights with respect to the children. The second part provided for financial arrangements for the applicants to pay the surrogates 2,000,000 rupees (approximately £27,000), comprising in part medical expenses and compensation. The clinic was not a party to, nor responsible for, the financial agreements between the surrogates and the applicants. Following birth, both surrogate mothers signed consent forms confirming the birth, receipt of payment, and consent to removal from India. Mr. and Mrs. A then applied for parental orders in the UK. In considering the application, the Court considered (i) whether the payment was in contravention of 'reasonable expenses', (ii) whether retrospective authorisation of any payment was required, and (iii) whether the paramountcy of the child's welfare is engaged in decisions concerning the retrospective authorisation of payments. Out of the 2,000,000 rupees paid to the clinic by Mr. and Mrs. A, 1,400,000 rupees was for medical care and 670,000 rupees was for non-medical expenses such as legal fees and compensation for the surrogates, coordinator, and donor, if applicable. The applicants accepted that the payments went beyond reasonable expenses but sought the Court's authorisation, relying on the fact that they acted in good faith, with no attempt to defraud, and that the payments were not so disproportionate that the granting of parental orders would be an affront to public policy. On behalf of the children, it was also argued that the payments should be retrospectively authorised and the children's welfare required the making of parental orders.

While it appears from the case law that '*any payment described as "compensation" (or some similar word) as prima facie being a payment that goes beyond reasonable expense,*'³⁹⁹ these cases illustrate the opacity of what is and what is not a reasonable expense. The courts have showed themselves to be more concerned to secure the future of a particular child than to maintain strict rules on expenses. In Mr. Justice Hedley's words:

What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate

³⁹⁸ [2011] EWHC 3147.

³⁹⁹ Note 25, at para. 7.

against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by an application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.⁴⁰⁰

The words have been echoed throughout the case law. In *A and B (surrogacy: domicile)*, Mrs. Justice Theis had to consider whether the court should exercise its discretion to authorise the payment of under £3,000 made to a surrogate in India.⁴⁰¹ Under the terms of the gestational surrogacy agreement, the applicants made payments, via the clinic, to the respondent totalling 260,000 Indian Rupees (approximately £2,958). It was conceded by the parties that this payment was for more than expenses reasonably incurred. Therefore, consideration had to be given as to whether the court should exercise its discretion to authorise that payment pursuant to section 54 (8) HFEA 2008. In the words of the Court:

In exercising that discretion the court needs to take into account a number of matters, including whether the applicants have acted in good faith and without moral taint in their dealings with the surrogate mother; whether the applicants were party to any attempts to defraud the authorities (per *Hedley J Re X and Y* [2009] 1 FLR 733 at paragraph 21). The court also needs to be alert to public policy considerations to ensure that commercial surrogacy arrangements were not used to (a) circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country; (b) not to be involved in anything that looked like the simple payment for effectively buying children overseas; (c) to ensure that sums of money that might look modest in themselves were not in fact of such substance that they overbore the will of a surrogate.

[...] The parental order reporter details in her report her enquiries made with the clinic in India, which enables her to conclude that she is satisfied with the propriety and legality of the arrangements that were entered into. Whilst the

⁴⁰⁰ Note 21, at para. 24.

⁴⁰¹ [2013] EWHC 426 (Fam).

level of payment is worth considerably more in India than elsewhere there is no evidence to suggest that it overbore the will of the respondent, or in any other way put undue pressure on her. Therefore, in the circumstances of this case, I am satisfied that the court should exercise its discretion and authorise the payment to the respondent.

A and B have set out their circumstances and plans for C's care in their statements. The parental order reporter has visited their home on three occasions. She describes the applicants as being 'utterly committed to meeting his [C's] needs and providing him with the best opportunities throughout his life. They are extremely child focussed and interact with C constantly. He experiences much emotional warmth and positive reinforcement'. This assessment was wholeheartedly supported by enquires she made with the health visitor who said she had 'absolutely no concerns' about C. The parental order reporter has discussed with the applicants how they will share C's birth history and origins; she describes their approach and attitude to this, and the issues that may lie ahead, as being 'open, positive, educated and child-focussed'. Her report recommends a parental order should be made. I agree with her detailed analysis of the issues. C's welfare demands that he has lifelong security and stability. That welfare need requires an order that will secure his legal relationship with the applicants. This can only be achieved by a parental order, which is the order I shall make in favour of the applicants.

More recently, in *J v. G*,⁴⁰² in giving judgment, Theis J considered in reference to the payments to the surrogate, totalling \$56,750 plus expenses (the highest amount considered to date by the High Court), that the Court's paramount consideration was now the child's welfare throughout his or her lifetime and, as satisfied, that the payments were not sufficiently disproportionate to expenses reasonably incurred to be an affront to public policy; that the applicants had acted in good faith; and that the making of parental orders would be entirely in accordance with the twins' lifelong welfare. It is worth quoting the reasoning of the Court at length:

22. On the facts of this case I am entirely satisfied about the following matters:
(1) The payments in this case were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy. There is no evidence to suggest that they were of such a level to overbear the will of the surrogate. The surrogate was an experienced surrogate; she had been one twice before. She is a mature woman with financial means. She had legal

402 [2013] EWHC 1432 (Fam).

advice before entering into the agreement and was able to command a higher compensation fee because of her proven track record. [...]

(2) I am entirely satisfied the applicants have acted in good faith at all stages. Their journey to have a family has clearly been a long and arduous one, both emotionally and financially. There is no suggestion they have used surrogacy as a means of circumventing child protection laws. They are a loving and committed same sex couple with a stable home environment. They have detailed in their written evidence their decisions at each stage and the support they have from their wider family and friends. This view is shared by the experienced Parental Order Reporter. Her detailed and perceptive report extensively considers the issues raised in this case and concludes 'On the basis of my enquiries I am satisfied that the intended parents acted in good faith...' The evidence demonstrates the applicants formed a close relationship with the first respondent and her family. Following her telephone discussion with the first respondent the parental order reporter observes that the first respondent described her relationship with the applicants 'as close and spoke of their support to her during the pregnancy'.

(3) This assessment of the applicants is supported by the fact that they have taken all proper steps to comply with the legal parentage requirements in both the US and in the UK. The relevant court in California made a judgment prior to the birth that the applicants were the legal parents. Following that procedure the position under Californian law is that the children's legal parents are the applicants. The respondents' legal status in that jurisdiction is extinguished. The applicants applied for parental orders in this jurisdiction to secure their position as parents for the purpose of UK law. [...]

(5) It is quite clear, in the circumstances of this case, there is no evidence of any attempt to circumvent the relevant authorities at any stage.

23. In the circumstances of this case the court should exercise its discretion pursuant to section 54 (8) and authorise the payments made other than for expenses reasonably incurred.

Welfare

27. A parental order will safeguard the children's welfare on a lifelong basis as it will

(1) Confer joint and equal legal parenthood and parental responsibility upon both the applicants. This will ensure each child's security and identity as lifelong members of the applicants' family.

- (2) Fully extinguish the parental status of the respondents under English law.
- (3) Make each of the children British citizens which will entitle them to live in the UK with their family on a permanent basis. This is by the operation of Schedule 4 paragraph 7 of the HFEA Regulations which provides that the children will become British citizens upon the grant of parental orders in favour of either of the applicants, both of whom are British citizens.

29. I am entirely satisfied the only order that will secure the lifelong welfare needs of each of these children is a parental order. Only that order will provide the lifelong security and stability that their welfare clearly demands.

To date, no judgment has been reported in which an application for a parental order has been refused on the grounds that an unacceptably large sum of money (beyond 'reasonable expenses') has been paid to the surrogate mother (or any intermediary) by the commissioning couple.

The cases also suggest that if it is desired to control commercial surrogacy arrangements, regulatory involvement and controls need to operate before the court process is initiated, i.e., at the border or even before. Although the detail of such controls would clearly need careful thought, tackling the issues at an earlier stage is surely a better approach than leaving breaches of the law to be discovered only after a child is born (and in the case of international surrogacy, awaits travel documentation), by which time, welfare considerations are bound to preside and the court will, although possibly at great expense and complexity, be compelled to find some solution.

3.8.6 *Nationality of the child*

Under British nationality law, a person born outside the UK shall be a British citizen if, at the time of birth, his father or mother is a British citizen otherwise than by descent.⁴⁰³

The issuance of a parental order will also, as discussed below, establish British citizenship for the child. The UK Government has published formal guidance in relation to cross-border surrogacy agreements and immigrations and citizenship rules (hereinafter, the 'Guidelines').⁴⁰⁴ It is important to realise that these Guidelines do not provide a schema for the attribution of legal parenthood in cases of cross-border surrogacy; they merely provide guidance as to the principles which will be considered in the approval of applications for travel documentation, nationality, and immigration status. In relation to parental

⁴⁰³ Section 2 British Nationality Act 1981.

⁴⁰⁴ UK Foreign and Commonwealth Office, 'Surrogacy Overseas' available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/324487/Surrogacy_overseas__updated_June_14_.pdf>.

legal status, the UK Home Office makes it clear that national law is applicable to the parties concerned and that foreign birth certificates and/or court orders are not binding on the national authorities.

A child born to a foreign national surrogate mother who is married will not be automatically eligible for British nationality. In this case, the intending parents will need to first apply for Home Office registration of a child under 18 as a British citizen, before applying for a passport for the child.⁴⁰⁵ If the surrogate mother is single or widowed/divorced, no application for registration of the child is needed and application for a British passport for the child can be submitted provided the commissioning father is British, has a genetic link to the child, and is able to pass on his nationality (e.g., is a British national otherwise than by descent).⁴⁰⁶ In both instances, a number of documents are requested to support the application including the following:

A surrogacy agreement on official headed paper. This should be signed by all parties and dated.

Document signed by the surrogate mother which confirms that the surrogate mother gives up parental responsibility and custody of the child. This confirmation should be witnessed by a Notary Public and can only be given by the surrogate mother after the child is born. You should seek legal advice about this. Please note: If this permission is given less than 6 weeks after the birth, you cannot later use it for an application for a parental order.⁴⁰⁷

Following this, a number of observations can be made.⁴⁰⁸ First, the process of returning with a child is likely to be more straightforward if the commissioning father is the genetic father of the child and the surrogate mother is single/not married. British nationality crystallises at the moment of birth. Second, if the commissioning father's genetic connection can be evidenced,⁴⁰⁹ this provides scope for him to be regarded as the child's legal parent or guardian and thus eligible to apply for the necessary travel documentation. However,

405 Section 1 British Nationality Act 1981.

406 Guidelines (see UK Foreign and Commonwealth Office, 'Surrogacy Overseas', *infra*).

407 Guidelines, *ibid.*, under 'List of documents required when applying for a passport without registration in surrogacy cases' and 'List of documents required when registering your child with the Home Office as a British National'.

408 See for an overview of the UK rules on nationality the country profile submitted to EUDO Citizenship database by C. Sawyer and H. Wray, last update November 2012, available at: <[http://eudo-citizenship.eu/country-profiles/?country=United Kingdom](http://eudo-citizenship.eu/country-profiles/?country=United+Kingdom)>.

409 The Guidelines state if DNA evidence is needed, the Home Office can only accept DNA test reports from UK organisations accredited by Her Majesty's Court Service which are detailed on the UK Ministry of Justice website. The DNA sample will need to be collected in the presence of an officer. (See UK Foreign and Commonwealth Office, 'Surrogacy Overseas', *infra*.)

much depends on the surrogate mother's marital status as UK law will initially regard her husband as the legal father.

To ensure parity with adoption legislation, the Parental Order Regulations 2010 ensure that where a parental order is made in the UK and one or both of the commissioning couple (including the commissioning mother with no genetic relationship with the child) are British citizens,⁴¹⁰ the child – if not already so – will become a British citizen.⁴¹¹ In other situations (depending on whose gametes are used, the immigration status of the gamete provider, and the marital status of the surrogate mother), entry clearance for UK immigration purposes will be required.⁴¹²

It should be noted that as UK law regards the surrogate mother as the legal mother, that until such time as a parental order is made, there is little scope for the commissioning mother to establish herself as a parent or guardian for the purposes of applying for travel documentation after the child's birth. Even if the surrogate mother relinquishes her status as the legal mother, this will only be relevant for the later purpose of transferring legal parenthood according to the national legislation. This means that even if the commissioning mother is the genetic mother, she has no official standing with respect to applying for the child's travel documentation or establishing their citizenship status.

3.8.7 *Birth registration and records*

All births in England, Wales, and Northern Ireland must be registered within 42 days of the child being born. The notification should be made by the parents, other person present during parturition, a physician or midwife, and also the health care facility where the child was born. The birth certificate is drawn up on the basis of a written notification of birth issued by a physician, midwife, or health care facility. The birth should be registered in the registry office in the municipality where it occurred.

Since 1994, the granting of parental orders in appropriate cases of surrogacy has become an accepted and unremarkable aspect of the work of the family court. Parental orders are

⁴¹⁰ Whether or not British citizens can pass on citizenship to their children depends, in part, on whether they are citizens by descent or 'otherwise than by descent'. British citizens by descent inherited their citizenship from a relative. Examples of citizens 'otherwise than by descent' are those who were born in the UK, or in a qualifying UK territory, or who have become naturalized British citizens. However, it is also possible to become a British citizen 'otherwise than by descent' through registration. British citizens otherwise than by descent have a much greater ability to pass citizenship on to their own children than British citizens by descent.

⁴¹¹ Sections 1(5)(a) and (5A)(a) British Nationality Act 1981 as applied to parental orders by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 Sch. 4 para. 7. *See generally Re IJ (A Child)* [2011] EWHC 921 (Fam).

⁴¹² The UK Border Agency has issued guidance known as 'Inter-Country Surrogacy and the Immigration Rules' (2009) available at: <www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/Inter-country-surrogacy-leaflet>.

subject to specific national (i.e., (1) England and Wales, (2) Northern Ireland, (3) Scotland) legislation because the underlying adoption legislation is itself nation-specific rather than UK-wide.⁴¹³ By the end of 2009, Blyth quotes that 725 parental orders had been registered in England and Wales, three in Northern Ireland, and 34 in Scotland.⁴¹⁴ The UK Department of Health quotes that approximately 50-70 parental orders are granted each year.⁴¹⁵ In the UK, a child's birth should be registered with one of the three General Register Offices (GRO) (i.e., for England and Wales, Northern Ireland, or Scotland) within six weeks of the child's birth. Following the issue of a parental order, the child's name is entered on a Parental Order Register maintained by the relevant GRO, and the child's original birth certificate is replaced with a new certificate that specifies the child's name (which may be different from the name given at birth) and identifies the commissioning parents as the child's legal parents.

The register does not record genetic facts but legal status. Thus, where children are born following ART in which donor gametes have been used, it is the legal parents who will be registered as parents on the birth certificate, not the gamete donors. The implication of this for surrogacy arrangements is that the original legal parents will be named on the child's first birth certificate, even when the commissioning parents are the genetic parents of the child.

A Parental Order Register is, however, maintained by the Register General at the GRO. This register contains a record of the result of parental orders made under HFEA 2008. When the child concerned is 18 years of age, he or she has a right to find out details about his or her birth from the register. The entry will record the commissioning parents as the legal parents of the child, and this will replace the entry originally made in the register of births. Although parenthood is technically transferred when a parental order is made (which happens sometime after birth), the short window of opportunity to apply, the re-issue of the birth certificate, and the requirement that the child is already in the care of the commissioning parents acknowledge that the effect of a parental order is to clarify and affirm parenthood (where everyone agrees) rather than, in any real sense, to transfer it from one family to another. The process is also deliberately designed to be more contained than an adoption application, and there is no requirement for prior vetting of prospective

413 Births and Deaths Registration Act 1953 (England and Wales); Births and Deaths Registration (Northern Ireland) Order 1976 (S.I. 1976/1041 (N.I. 14)) (Northern Ireland); the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Scotland).

414 E. Blyth, 'Parental Orders and Identity Registration: One Country Three Systems' [2010] 32(4) *Journal of Social Welfare and Family Law* 345-352.

415 Impact Assessment of the Human Fertilisation and Embryology (Parental Order) Regulations 2010 (January 2010; on file with author). It has been reported in the media that the number of babies registered in Britain after being born to a surrogate parent has risen by 255% since 2008, see <www.independent.co.uk/news/uk/home-news/revealed-surrogate-births-hit-record-high-as-couples-flock-abroad-9162834.html>, *The Independent* 2 March 2014.

parents (instead, there is a welfare assessment carried out as part of the post-birth court application). UK law has long recognised that it would be inappropriate for parents of their own genetic child to undergo the full rigours of an adoption application and that surrogacy requires a very different approach.

The information that can be disclosed by the courts is specified in rule 13.16 of the Family Procedure Rules 2010. A person who is the subject of a Parental Order and at least 18 years of age may apply to the Court to receive copies of the application for the Parental Order (but not any attached documents), the Parental Order and any other orders relating to the proceedings, any transcript of the Courts decisions, and the report made to the Court by the Parental Order Reporter. Where the child is born as the result of a donor egg or sperm in the surrogacy arrangements, the resulting child has the right to apply for identifying information about the egg and/or sperm donor(s) once the child reaches the age of 18.

3.8.8 *Advertisement*

Under the 1985 Act (as amended by section 59 HFEA 2008), it is an offence to publish or distribute an advertisement in the UK that someone may be willing to enter into a surrogacy arrangement or that anyone is looking for a surrogate mother or that anyone is willing to facilitate or negotiate such an arrangement. This prohibition does not apply to an advertisement placed by, or on behalf of, a non-profit-making body, provided that the advertisement only refers to activities which may legally be undertaken on a commercial basis. This would mean that a not-for-profit body could advertise that it held a list of people seeking surrogate mothers and a list of people willing to be involved in surrogacy and that it could bring them together for discussion. The law covers adverts online worldwide as well as in print, if they are placed by someone in the UK and can be viewed in the UK.⁴¹⁶

To avoid the commercialisation of surrogacy and the growth of profit-driven agencies, the 1985 Act prohibits organisations, or people other than intending parents or surrogate mothers themselves, from undertaking certain activities relating to surrogacy on a commercial basis. Section 59 HFEA 2008 allows bodies that operate on a not-for-profit basis to receive payment for providing some surrogacy services.⁴¹⁷ Not-for-profit bodies are not permitted to receive payment for offering to negotiate a surrogacy arrangement or for

416 R. Fenton, S. Heenan and J. Rees, 'Finally Fit for Purpose? The Human Fertilization and Embryology Act 2008' [2010] 32(3) *Journal of Social Welfare and Family Law* 275-286.

417 One of the better known organizations, Childlessness Overcome Through Surrogacy (COTS) was set up by a partnership between Kim Cotton, who has herself been a surrogate on two occasions, and Gena Dodd, an intended mother.

taking part in negotiations about a surrogacy arrangement.⁴¹⁸ These activities are not unlawful if there is no charge, however. A non-profit-making body might charge, for example, for enabling interested parties to meet each other to discuss the possibility of a surrogacy arrangement between them. A not-for-profit can also compile information about surrogacy. Not-for-profit organisations are, for example, able to charge for establishing and keeping lists of people willing to be a surrogate mother or intending parents wishing to have discussions with a potential surrogate mother. Section 1 1985 Act (as amended) provides that non-profit-making bodies can only recoup the costs of doing the activities for which they are no longer prohibited from charging. It provides that any reference to a 'reasonable payment' is to a payment which does not exceed the body's costs reasonably attributable to the doing of the act.⁴¹⁹

The role that surrogacy agencies perform in the surrogacy process is an aspect not to be ignored. Mr. Justice MacFarlane has been critical of the lack of oversight and regulation of such agencies:

The court's understanding is that surrogacy agencies [...] are not covered by any statutory or regulatory umbrella and are therefore not required to perform to any recognised standard of competence. I am sufficiently concerned by the information uncovered in these two cases to question whether some form of inspection or authorisation should be required in order to improve the quality of advice that is given to individuals who seek to achieve the birth of a child through surrogacy. Given the importance of the issues involved when the life of a child is created in this manner, it is questionable whether the role of facilitating surrogacy arrangements should be left to groups of well-meaning amateurs. To this end, a copy of this judgment is being sent to the Minister of State for Children, Young People and Families for her consideration.⁴²⁰

3.8.9 *National considerations*

Although the circumstances that have arisen in *A and A v. P, P and B*⁴²¹ are, it is hoped, rare in practice, they bring into sharp focus the difficulties that can arise in surrogacy arrangements in the human rights context. The Court had to consider whether it was

⁴¹⁸ Section 2(1) 1985 Act prevents a third party (though not a surrogate or intended parents) from initiating or taking part in negotiations, offering or agreeing to negotiate, or compiling any information with a view to its use in making, or negotiating the making of, surrogacy arrangements.

⁴¹⁹ See House of Lords Explanatory Note on HFEA 2008 available at: <www.publications.parliament.uk/pa/ld200708/ldbills/006/en/08006x-d.htm>.

⁴²⁰ *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) at para. 29.

⁴²¹ [2011] EWHC 1738 (Fam).

enabled to make a parental order in favour of a deceased commissioning parent (the applicant husband died after the application for a parental order was issued by the intending parents prior to the making of the order). While this case raises interesting issues about statutory interpretation, the Court's consideration of the Human Rights Act 1998 and the UNCRC⁴²² in a surrogacy setting has brought to the fore live questions with respect to the child's right to an identity and to family life. Theis J found that *A and A v. P, P and B* was fundamentally about identity rights and the recognition of a parent-child relationship which is central to the child. It was held that the effect of not making a parental order would have been an interference with that family life (the child would not have been treated as though born to both applicants). The Court's responsibility is to '*guarantee not rights that are theoretical and illusory but rights that are practical and effective*'.⁴²³ Although Mrs. Justice Theis was able to find a way around the law in this case because the father had died after issuing the application, what would have happened if either of the parents had died earlier, perhaps during the pregnancy?

The 1985 Act and the HFEA 2008 appear to provide a regulatory framework for surrogacy arrangements in the UK. The legislation enables heterosexual and same-sex couples and single women to access the ART services provided by licenced centres. It also permits altruistic (broadly defined) surrogacy arrangements. A particular strength of the relevant legislation is its clarity in relation to nationality and parentage. Applied to surrogacy arrangements, the high level of certainty regarding legal parental status when the child is born serves not only the child's interests but also the interests of the other parties. Unless the surrogate is, quite apart from the surrogacy arrangement, entirely unfit to parent the child, she is unlikely to be ordered to give up the child.

UK law does not, however, have all the answers. Even if the majority of the reported surrogacy arrangements pass without incident, there is, nonetheless, a pressing case for a regulatory framework that is able to deal effectively with the serious problems that have arisen in the remaining minority of cases. One commentator has welcomed this lack of regulation as a means of avoiding '*medical and social work imperialism*'⁴²⁴ but, as the Brazier Review recognised,⁴²⁵ the regulatory vacuum in which partial surrogacy operates can leave vulnerable parties unprotected. This raises concerns both with regard to the possible exploitation of surrogates who, the Review suggested, might be induced to act in an injurious way by the prospect of large payments and with regard to infertile couples, desperate in their desire for children, who might equally suffer at the hands of an unscrupulous

422 The UK signed the Convention on 19 April 1990, ratified it on 16 December 1991 and it came into force on 15 January 1992.

423 *Ibid.* (Quoting *Marckx v. Belgium* [1979] 2 EHRR 330 at para. 31).

424 M. Freeman, 'Does Surrogacy Have a Future after Brazier?' [1999] 7 Medical Law Review 1.

425 Brazier Review, para. 6.5.

surrogate. And, finally and most significantly, the lack of regulatory oversight raised concerns for the welfare of any children born as a result of surrogacy arrangements.

It is clear from this brief overview of the case law and the legislation in this area that the UK approach is consistent in all cases: the court applies *lex fori*. We have seen the courts retrospectively approving surrogacy payments made abroad which go beyond reasonable expenses, thus demonstrating the creativity of the UK courts in finding alternative solutions where a surrogacy arrangement does not fit the UK's acceptable model (purportedly altruistic, consenting and privately arranged). It will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order, if other welfare considerations support the order being made. Each case needs to be carefully considered on its own facts and circumstances. The questions now for the UK⁴²⁶ include (i) how to regulate the impact of the perceived increase of cross-border surrogacy arrangements on its substantive law and the question of 'reasonable expenses'; (ii) whether existing law and practice adequately safeguard the welfare of the child, the surrogate, her family, and the commissioning parents; (iii) whether payments to surrogate mothers need to be expressly limited to actual expenses (including loss of earnings) occasioned by the pregnancy; and (iv) whether it is appropriate to seek to implement a system of regulation which ensures that any third party involved in surrogacy arrangements acts appropriately and sets out guidance aimed to prevent intentional or unintentional exploitation of each other by the parties to the arrangements.

3.9 INDIA

3.9.1 Overview of the domestic approach to surrogacy⁴²⁷

Although the number of surrogate births in India is not known, case law and anecdotal evidence indicate that India is a jurisdiction of destination for surrogacy. In each of the reviews with respect to France, Belgium, UK, and the Netherlands, a number of the reported cases of inter-country surrogacy have involved Indian resident surrogates. India does not, however, have specific legislation dealing with surrogacy. This means, more specifically, that India does not prohibit surrogacy nor seemingly does it intend to, but in recent years,

⁴²⁶ A review of HFEA 2008 and the Parental Order 2010 Regulations was due in November 2012.

⁴²⁷ For an overview of surrogacy in India, see the work of U. Rengachary Smerdon, 'Birth Registration and Citizenship Rights of Surrogate Babies Born in India' [2012] 20(3) *Contemporary South Asia* 341-358; 'Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India' [2008] 39(1) *Cumberland Law Review*. Case law referenced in this section is available at: <www.aillaweb-cle.org/resources/Resources%20for%2010-13-11%20Seminar.pdf>; in Gujarati at <[http://gujarathc-casestatus.nic.in/gujarathc-tabhome.jsp](http://gujarathc-casestatus.nic.in/gujarathc/tabhome.jsp)>; <<http://gujarathc-casestatus.nic.in/gujarathc-tabhome.jsp>>: Supreme Court of India <<http://judis.nic.in/supremecourt/chejudis.asp>>.

India has recognised the need to regulate certain aspects of surrogacy and has engaged in a review of the possible legal framework.⁴²⁸ This process is complicated not simply by the 'federal structure of the state, but also by the role of personal law, for Indian citizens may be subject to the jurisdiction of communal/religious authorities in regard to their domestic relations.'⁴²⁹

In order to regulate and supervise ART clinics and the surrogacy process, the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) prepared National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005 (the 'Guidelines').⁴³⁰ A code of practice for the clinics, doctors, and patients is also published.

3.9.2 Legal parenthood

As India is considered to be a surrogacy 'hotspot', the discussion below focuses on Indian law and practice as it relates principally to non-Indian resident intended parents (i.e., inter-country rather than domestic surrogacy) as well as the regulatory framework that has been adopted in India.

In the absence of any statutory framework, it should be noted that there is no requirement to make a court application for a pre-birth order or post-birth order on parentage in India although it would seem possible, if required, for intending parents to obtain a court decree post-birth declaring their status as legal parents.

(a) The grounds for legal maternity

In India, according to the Guidelines, the surrogate mother is not considered to be the legal mother.⁴³¹ Guideline 3.5.5 provides that a surrogate mother must relinquish in writing all parental rights concerning the offspring. Although no express statutory provision can be found, it appears that Indian practice recognises the intending mother as the legal mother of a surrogate-born child provided she is genetically related to the child. In the absence of a genetic relationship, the surrogate is the legal mother at birth.

428 A law commission report recommending that legislation be established was placed before the relevant Ministry, as well as a draft bill (The Assisted Reproductive Technologies (Regulation) Bill 2010, *available at*: <www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>); *see also* R. Bhatnagar, 'Government Will Enact Surrogacy Law, Says the Solicitor General', 21 January 2010, *available at*: <http://inwww.rediff.com/newshound/searchshowarticle.htm?rediffid=http://www.dnaindia.com/india/report_govt-will-enact-surrogacy-law-says-solicitor-general_1337205>.

429 *See* N. Subramanian, 'Making Family and Nation: Hindu Marriage Law in Early Postcolonial India' [2010] *Journal of Asian Studies* 771.

430 *Available at*: <http://icmr.nic.in/art/art_clinics.htm>.

431 Law Commission of India, 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy', Report No. 228 (August 2009), 1.14.

Guideline 3.5.6 provides that no ART procedure shall be permitted without the spouse's consent. A surrogate mother carrying a child genetically unrelated to her must register as a patient in her own name. While registering, she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child.

(b) The grounds for legal paternity or parenthood of the second parent

Again, although no surrogacy-specific statutory provision can be found, the intending (genetic) father is treated as the legal father at birth. This is inferred from the Guidelines⁴³² and from the case law discussed below.

(c) Inter-country surrogacy

A selection of the reported cases of inter-country surrogacy follows.

In November 2009, the High Court of Gujarat handed down a judgment with respect to children born in India to an Indian surrogate and Jan Balaz, a German intending father.⁴³³ Balaz and his wife, Susan Lohle, faced with her infertility, had chosen to have children through gestational surrogacy. An unidentified woman from India had donated the ova which were fertilised with the sperm of Jan Balaz. The resulting embryo was transferred into the womb of a woman in Anand who gave birth to twins. Unable to return to Germany due to the German Consulate's refusal to recognise the intending parents as the legal parents of the twins in order to be able to issue passports, the Balazs sought Indian passports. While the lower court refused to recognise the children as Indian for they lacked an Indian parent, the Gujarati Anand Nagar Palika recalled their birth certificates. More significantly, the name of Suzanne Lohle (Jan Balaz's wife), who had originally been identified as the mother, was replaced with that of the surrogate pursuant to an order of the Gujarat High Court. The passport applications identified the children as Nikolas Balaz and Leonard Balaz; Jan Balaz appeared as the father and the surrogate, as the mother. Two Indian passports were issued for the twins. But shortly thereafter, Balaz received a notice issued by the Government of India, Ministry of External Affairs, and Regional Passport Office, which requested him to surrender both passports while the matter was pending before the High Court of Gujarat. On appeal, the High Court of Gujarat recognised the nationality right of the children: that they were Indian, it held, because they were born on Indian soil to an Indian mother. The surrogate, in other words, was now the natural (and only) mother.

⁴³² Guideline 3.10.1.

⁴³³ *Jan Balaz v. Anand Municipality*, 11 November 2009 Letters Patent Appeal No. 2151 of 2009 in Special Civil Application No. 3020 of 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151 of 2009 with Special Civil Application No. 3020 of 2009, available at: <<http://indiansurrogacylaw.com/jan-balaz-v.-anand-municipality.html>>.

It is reported that Mr. Balaz had to approach the Gujarat High Court to have the twins' birth certificates further modified to remove all references to the court case such that the passport office would agree to issue the passports. Balaz was also obliged to seek a declaration from the Gujarat High Court that he had sole custody of the twins. The Gujarat High Court saw no disputable issue that Balaz should be considered the sole custodial parent of the twins:

[I]t is evident that he is taking care of the children immediately after their birth. And since their birth he takes care of them and carries the whole responsibility for them and their well-being. He imparts not only his own culture and language to his children; he also educates them and is responsible for the medical treatment of the children.⁴³⁴

In contrast, the surrogate mother had no basis for sharing custody. In addition, the Gujarat High Court noted that the surrogate:

Has seen the children only on a few occasions in the first weeks of their life. For the children, she is a stranger to whom they have no connection and no feelings. She has expressed from the beginning her refusal to take the children or to be involved in their education. Fact is that she has never taken care of the children. She has also no interest in the further development of the twins. Neither visits to the children nor has any form of communication taken place. Neither telephone calls nor mails of the applicant have been answered [...]. She gave an affidavit in favour of the applicant that she has no emotional or social bonds to the children [...]. She rejects exclusively and unchangeably to take the children in her care and to educate them.⁴³⁵

The Gujarat High Court declared that Balaz had custody. After a two-year legal battle, the Supreme Court of India intervened, and in a hearing on 26 May 2010, the Indian Government agreed to provide the twins exit permits. Smerdon observes that the Gujarat High Court appears to disregard implicitly the applicant wife as an interested party since she was not the genetic mother of the children and did not give birth to them. Given the level of cooperation of the surrogate, Smerdon surmises that a different outcome in a case may arise *'if the surrogate laid claim to the children or if the father was not also genetically related*

434 *Ibid.*

435 *Ibid.*

to the children. The case also suggests that the appropriate mother to list on the Indian birth certificate is the Indian surrogate mother.⁴³⁶

In 2007, a Japanese couple, the Yamadas, engaged a surrogate in India to carry an embryo created from the husband's sperm and an egg from an anonymous donor. In 2008, baby Manji was born.⁴³⁷ Prior to his birth, however, the Japanese couple separated and the wife was not willing to accept the child. The surrogate also abandoned the baby. Indian authorities refused to issue baby Manji an Indian passport, contending that he was not an Indian citizen. The terms of the surrogacy agreement provided that the intending father, Dr. Yamada, would retain sole custody of Manji in the event of a separation, a condition that was not challenged by Mrs. Yamada, who no longer wanted the child.

Manji had three potential mothers: the former Mrs. Yamada, the anonymous egg donor, and the surrogate. Since the egg donor could not be identified and neither Mrs. Yamada nor the surrogate woman wanted custody of the child, a birth certificate was issued which listed Dr. Yamada as the father and no mother. Under section 3 Citizenship Act 1955, persons born in India after 2003 may only acquire Indian citizenship if at least one of their parents is an Indian citizen.⁴³⁸ Under these circumstances, Manji could not acquire Indian citizenship because her only legally recognised parent, Dr. Yamada, was not an Indian citizen. Japan also refused to recognise Manji as a Japanese national, for Japan did not have laws regulating surrogacy and the Japanese Civil Code restricted its recognition to that of a matrilineal connection to the woman who gives birth to the child – in this case, the Indian surrogate.⁴³⁹ Although Dr. Yamada was Manji's genetic father and a citizen of Japan, Japan's nationality laws at the time dictated that a child born out of wedlock to a Japanese father and a foreign mother could not be recognised as a Japanese citizen unless the father had legally recognised the child before birth. Dr. Yamada was also not permitted to adopt Manji because India does not allow single men to adopt a female child. Manji's paternal grandmother requested permission from the court for the infant to travel with her and for the issuance of a passport. The Japanese Government issued a one-year visa after the Indian Government had granted the baby a travel certificate in compliance with a recent ruling of the Indian Supreme Court enabling the grandmother to travel to Japan with Manji. According to Japanese authorities, Manji may be granted Japanese citizenship once a parent-child relationship was established through recognition of paternity or through adoption.

436 U. Rengachary Smerdon, 'Birth Registration and Citizenship Rights of Surrogate Babies Born in India' [2012] 20(3) *Contemporary South Asia* 343.

437 *Baby Manji Yamada v. Union of India*, A.I.R. 2009 S.C. 84; see also R. Parihar, 'Identity Crisis', *India Today*, available at: <<http://indiatoday.intoday.in/story/Identity+crisis/1/12831.html>>.

438 Section 3 Citizenship Act 1955.

439 Saiko Saibansho [Sup. Ct.] 23 March 2007, 2006 (kyo) no. 47.

Taken together, this selection of cases highlights a lack of legal certainty. The *Baby Manji* and *Balaz* cases illustrate that the Indian courts have struggled in the absence of comprehensive legislation to address fundamental issues of the rights that should be afforded to surrogate-born children given the differing interests of the parties and states involved.

3.9.3 *Payments in surrogacy*

From the collection of case reviews, it can be observed that India is a free-trading surrogacy market. In *Yamada v. Union of India* (2008), the Court noted that commercial surrogacy is legal in India.⁴⁴⁰ Anecdotally, advertisements on websites in India and commentators suggest costs of at least USD 25,000 to USD 30,000.⁴⁴¹ The payment for the surrogate is estimated to be from USD 2,500 to USD 7,000.⁴⁴²

From Pande's studies in India, it is noted that the typical surrogate in her study was poor, lives in a rural area, undereducated, married young, and lives in an extended family that includes her in-laws.⁴⁴³ It is reported that the payments that surrogates receive for carrying a baby often equal four or five times their annual household income. Although the payment is less than in other countries, such as the USA, the sum is significant in the lives of these surrogates. Surrogates state that the income allows them to provide education for their children or to purchase a home.

The commercial realities are reflected in the Guidelines. Guideline 3.5.4 sets out:

All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother.

Guideline 3.5.3 provides that the ART clinic must not be a party to any commercial element in donor programmes or in gestational surrogacy. Addressing the principle of fees and the

440 *Yamada v. Union of India*, 2008 Indlaw SC 1554 (29 September 2008).

441 S. DasGupta and S. Dasgupta (eds.) *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014), Introduction.

442 U. Rengachary Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India' [2008] 39(1) *Cumberland Law Review*.

443 A. Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' [2010] 35 *Journal of Women in Culture and Society* 969, 974.

conflict of interests, Guideline 3.9.2. deals with the sourcing of oocytes and surrogate mothers:

Law firms and semen banks will be encouraged to obtain (for example, through appropriate advertisement) and maintain information on possible oocyte donors and surrogate mothers as per details mentioned elsewhere in this document. The above organizations may appropriately charge the couple for providing an oocyte or a surrogate mother. The oocyte donor may be compensated suitably (e.g. financially) by the law firm or semen bank when the oocyte is donated. However, negotiations between a couple and the surrogate mother must be conducted independently between them.

Guideline 3.10.3 adds that payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect.

3.9.4 *Nationality of the child*

A child born in India after 3 December 2004 is a citizen of India by birth if (1) both the child's parents are Indian citizens or (2) one parent is an Indian citizen and the other is not an illegal migrant at the time of the child's birth.⁴⁴⁴ Indian citizenship terminates upon the voluntary acquisition of citizenship in another state. Acquiring another state's passport is deemed to be a voluntary acquisition of citizenship.⁴⁴⁵ Children born through surrogacy to non-Indian intending parties are not Indian even if they are born in India.⁴⁴⁶

The *Baby Manji* case highlights that the law remains unclear as to whether a child born to an Indian surrogate is a citizen of India. The Gujarat High Court addressed this question in the *Balaz* case discussed above, and the case was appealed to the Supreme Court of India. Japan's willingness to issue Manji a visa on humanitarian grounds was essential to the disposal of the case and is in sharp contrast to the prolonged proceedings of the *Balaz* case where Germany was unyielding for two years in its refusal to issue a visa to the children.

⁴⁴⁴ Citizenship Act 1955 (as amended).

⁴⁴⁵ Citizenship Rules available at: <www.helplineindia.com/docs/THE%20CITIZENSHIP%20%28AMENDMENT%29%20ACT,%202003>.

⁴⁴⁶ Section 3 Citizenship Amendment Act of 2003. Citizenship will not be conferred on a child born in India if either parent is a foreign diplomat accredited as such in India or an enemy alien and the birth takes place in a place under enemy occupation. Section 4 Citizenship Amendment Act of 2003. Special rules also apply to the children of Indian citizens living abroad.

In the *Balaz* decision, the Gujarat High Court stated that its primary concern lay with the rights of the two babies more than the rights of any of the others involved, although it did recognise that the emotional and legal relationships of the children with the surrogate mother and the donor of the ova were also of vital importance:

9. We may at the outset point out that lot of legal, moral and ethical issues arise for our consideration in this case, which have no precedents in this country. We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova are also of vital importance. Surrogate mother is not the genetic mother or biologically related to the baby, but, is she merely a host of an embryo or a gestational carrier? What is the status of the ova (egg) donor, which in this case an Indian national but anonymous. Is the ova donor the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or stateless babies? So many ethical and legal questions have come up for consideration in this case for which there are no clear answers, so far, at least, in this country. True, babies conceived through surrogacy, encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a live issue. Can we brand them as illegitimate babies disowned by the world?⁴⁴⁷

Throughout the Gujarat High Court's opinion, repeated references are made for comprehensive legislation to be enacted to define the rights of the respective parties. In the absence of such legislation, the Gujarat High Court stated that it was more inclined to view the gestational surrogate as the natural mother, not the anonymous egg donor or the wife of the genetic father, who had neither donated the ova nor conceived or delivered the children. Therefore, the Gujarat High Court appears to conclude that the children were citizens by birth pursuant to section 3(l) (c)(ii) Citizenship Act 1955.

3.9.5 *Birth registration and records*

Guideline 3.5.4 states that the surrogate mother shall not be the legal mother and the birth certificate shall be in the name of the intending genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother. As per the Guidelines, it seems that a surrogate born has a right to seek information about the circumstances of this birth on reaching 18 years of age but information relating

⁴⁴⁷ Supreme Court decision dated 11 November 2009 under Civil Application No. 11364 of 2009, at para. 9.

to the name and address (the personal identity of the gamete donor and/or the surrogate) is excluded; although how this is implemented in practice is not yet known. The practice of granting birth registration to intending parents in India is seemingly a matter of administrative practice with no legislative basis.

3.9.6 National considerations

Indian courts seem to take a fairly lenient response to international surrogacy, but because India is such a large and varied country with different states, lower regional courts seem, on occasion, to take a more conservative approach. Higher courts, including the Supreme Court, condone the practice of international surrogacy and treat the intending parents as legal parents. However, concern is expressed over the unregulated nature of the industry leaves surrogates vulnerable to exploitation. The Law Commission of India has summed up the situation as follows: '*It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers.*'⁴⁴⁸

In an exercise to legalise and regulate surrogacy, the Assisted Reproductive Technology (Regulation) Bill and Rules 2010 has been published (hereinafter the 'Draft Bill').⁴⁴⁹ The Draft Bill which is called an Act '*to provide for a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto*' provides as follows:

- i. It legalises commercial surrogacy in that the surrogate mother may receive monetary compensation for carrying the child for payment in return for her relinquishment of her parental rights.
- ii. The commissioning parties shall enter into a surrogacy agreement which shall be legally enforceable.
- iii. The child's birth certificate will record the commissioning parties as the parents.
- iv. The prescribed age limit for a surrogate mother is between 21 and 35 years.
- v. Single persons, men or women or single parents, unmarried couples can also engage a surrogate.
- vi. All non-Indians seeking infertility treatment in India will first have to register with their Embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted

448 Law Commission of India, 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy', Report No. 228 (August 2009), 1.7.

449 The Draft Bill is available at: <www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Ficmr.nic.in%2Fguide%2FART%2520REGULATION%2520Draft%2520Bill1.pdf&ei=vUTzU-PKDCWLOiffgdAC&usg=AFQjCNFgTuzZmt9x4PRRrVwfyN-VpEk9nA>.

- to in case of a change in circumstances such as the death of one or both of the commissioning parties.
- vii. A foreigner or foreign couple not resident in India or an NRI individual or couple seeking surrogacy in India shall appoint the local guardian legally responsible for taking care of the surrogate child during and after pregnancy.
 - viii. The commissioning parties must ensure and establish through proper documentation that the country of their origin permits surrogacy and that the child born will be permitted entry in the country of their origin as a biological child of the intended couple /individual. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obliged to take the child and be free to hand over the child to an adoption agency. In case of adoption or the legal guardian having to bring up the child in India, the child will be given Indian citizenship.
 - ix. Surrogacy is recommended for patients for whom it is medically impossible/undesirable to carry a baby to term.
 - x. ART clinics must not advertise surrogacy arrangements. The responsibility should rest with the couple or a semen bank.
 - xi. ART clinics must ensure that the surrogate woman satisfies all the testable criteria (sexually transmitted or communicable disease that may endanger the pregnancy).
 - xii. A prospective surrogate mother must be tested for HIV and shown to be a sero-negative for this virus just before embryo transfer.

As indicated above, the Draft Bill contains restrictions on any woman undergoing an ART procedure, which would include surrogate mothers, intending mothers, and egg donors. No ART procedure may be performed on a woman younger than 21 years.⁴⁵⁰ In addition, no woman may be treated with gametes or embryos originating from the gametes of more than one man or one woman during any one treatment cycle.⁴⁵¹

The Draft Bill requires that a surrogate mother (as defined in the Draft Bill) must be an Indian citizen between the ages of 21 and 35.⁴⁵² A woman may not be sent abroad to act as a surrogate.⁴⁵³ A woman who is married requires the consent of her spouse to be a surrogate.⁴⁵⁴ A relative, a person known to the commissioning party, or a stranger may serve as a surrogate, but if she is a relative, she must belong to the same generation as the commissioning mother.⁴⁵⁵

450 Section 20(14) Draft Bill.

451 Section 23(3) Draft Bill.

452 Sections 2(bb) and 34 Draft Bill.

453 Section 34(18) Draft Bill.

454 Section 34(16) Draft Bill.

455 Section 34(18) Draft Bill.

A surrogate may not also donate her eggs to the intended party seeking surrogacy (nor may her husband's sperm be used).⁴⁵⁶ A woman may not serve as a surrogate for more than five successful live births in her life, including her biological children, and she may not undergo an embryo transfer more than three times for the same couple.⁴⁵⁷

A surrogate is required to be medically tested and declare that she has not received a blood transfusion or product in the previous six months.⁴⁵⁸ She is not to engage in any act that would harm the foetus during pregnancy or the baby after birth.⁴⁵⁹ The surrogate mother must register in a specific manner, as stated in the Draft Bill above.⁴⁶⁰

As to requirements on the intending parents (termed commissioning parties in the Draft Bill⁴⁶¹), they must be unable to carry a baby to term.⁴⁶² It is not entirely clear whether surrogacy for commissioning gay and lesbian parties would therefore be permitted. The Draft Bill provides that ART shall be available to all persons, including single persons, married couples, and unmarried couples.⁴⁶³ The Bill defines 'couple' as '*two persons living together and having a sexual relationship that is legal in India*,' which suggests that gays and lesbians may be unable to engage in surrogacy arrangements.⁴⁶⁴ However, the Bill defines an 'unmarried couple' as '*two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country/countries of which they are citizens*.'⁴⁶⁵

Although the surrogate may be known to the commissioning couple, gametes may not be donated by a relative or known friend of the commissioning parties.⁴⁶⁶ However, the retrieval of gametes of a person whose death is imminent is permissible if the dying person's spouse intends to avail himself or herself of ART to have a child.⁴⁶⁷ Commissioning parties cannot use the services of more than one surrogate simultaneously.⁴⁶⁸

The commissioning parties must provide the surrogate with a certificate stating clearly that she has acted as a surrogate for them.⁴⁶⁹

The Draft Bill specifically provides that surrogacy agreements are legally enforceable.⁴⁷⁰ The Draft Rules contain standard forms of agreements for the following:

456 Sections 2(aa)(bb) and 34 Draft Bill.

457 Sections 34(5) and 34(9) Draft Bill.

458 Section 34(6) Draft Bill.

459 Section 34(23) Draft Bill.

460 Section 34(8) Draft Bill.

461 Section 2(g) Draft Bill.

462 Section 20(1) Draft Bill.

463 Section 32(1) Draft Bill.

464 Section 2(h) Draft Bill.

465 Section 2(d) Draft Bill.

466 Section 2(dd) Draft Bill.

467 Section 20(12) Draft Bill.

468 Section 34(20) Draft Bill.

469 Section 34(17) Draft Bill.

470 Section 34(1) Draft Bill.

- a. surrogacy;
- b. consent for donation of eggs;
- c. consent for donation of semen/sperm;
- d. information on the semen donor, oocyte donor, and surrogate mother;
- e. contracts (including the financial arrangements) between the ART Bank, on the one hand, and the semen donor, oocyte donor, surrogate mother, patient, or the ART clinic, on the other hand; and
- f. the contract (including financial arrangement) between the patient and the surrogate.

The surrogate mother is to relinquish all parental rights over the child and to hand over the child to the commissioning parties after delivery.⁴⁷¹ The Draft Bill states that birth certificates should be in the names of the intended parents, who then automatically become legal parents.

The model contract annexed to the Draft Rules provides that:

The surrogate clearly understands that the consideration for the surrogacy is to be paid by the parents and the Bank will not be responsible for any demand by the surrogate in the form of compensation. The Bank shall also not be responsible for payment to the surrogate for any expenses incurred during the surrogacy period.⁴⁷²

The model contract between the surrogate mother and commissioning parties sets forth a payment plan for the surrogate mother's compensation.⁴⁷³ A first instalment of at least 5% of the total agreed compensation is payable when the embryo transfer occurs, a second instalment of at least 5% is due when the surrogate becomes pregnant, a third instalment of at least 5% is due at the end of the first trimester, a fourth instalment of at least 10% is due at the end of the second trimester, and the remaining 75% is due just after delivery. If the first embryo transfer does not succeed, for each subsequent embryo transfer within six months of the first, the surrogate is to receive an additional 50% of the total initial price paid in the preceding instalments.

The commissioning parties must ensure that the surrogate mother is appropriately 'insured' until the child is handed over and until the surrogate mother is free from all health complications arising from the surrogacy.⁴⁷⁴

Non-Indian commissioning parties in India must ensure and establish to the ART clinic through proper documentation (i.e., a letter from either the embassy of the relevant

471 Section 34(4) and 35(6) Draft Bill.

472 Form R2.

473 Form U.

474 Section 34(24) Draft Bill.

country in India or from the foreign ministry of the country), clearly and unambiguously, that the country permits surrogacy and the child born through surrogacy in India will be permitted entry into that country as a genetic child of the commissioning couple/individual.⁴⁷⁵

Non-residents of India must appoint a local guardian, who will be legally responsible for taking care of the surrogate during and after the pregnancy.⁴⁷⁶ After this, the commissioning parties are legally bound to accept custody of the child, regardless of any medical or physical abnormality of the child.⁴⁷⁷

Refusal to take delivery of the child is considered an offence, punishable by imprisonment for up to three years or a fine or both.⁴⁷⁸ If the foreign commissioning party fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obligated to take custody of the child and is free to hand the child over to an adoption agency if the commissioning party or its legal representative fails to claim the child within one month of the child's birth.⁴⁷⁹ During the transition period, the local guardian is responsible for the well-being of the child.⁴⁸⁰

As to the child's nationality, the Draft Bill provides that if a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.⁴⁸¹ However, in cases where the commissioning parties refuse to accept the child and the child is raised or adopted by the appointed legal guardian, the Draft Bill provides that the child will be granted Indian citizenship.⁴⁸²

The Draft Bill limits the rights of the child born through surrogacy to learn his or her identity in the following manner:

36. Right of the child to information about donors or surrogates –
 - (1) A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother.
 - (2) The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.

⁴⁷⁵ Section 34(19) Draft Bill.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Section 34(11) Draft Bill.

⁴⁷⁸ Section 40 Draft Bill.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ Section 35(8) Draft Bill.

⁴⁸² Section 34(19) Draft Bill.

(3) Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother.

Provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.

While the current status of the Draft Bill is unknown, the Indian Home Ministry has issued visa guidelines making it more difficult for intending parents to obtain visas for entry to India for surrogacy arrangements.⁴⁸³ The Indian authorities now require commissioning parties to obtain a 'medical visa' to travel to India for the purposes of engaging in a surrogacy arrangement.⁴⁸⁴ On 9 July 2012, the Ministry of Home Affairs sent a letter to the Ministry of External Affairs setting out the procedure for granting visas to foreign nationals who visit India for the purpose of engaging in surrogacy arrangements; the only type of visa available for this purpose is a medical visa and not a tourist visa, which is considered a violation of visa conditions.⁴⁸⁵

The visa guidelines indirectly regulate surrogacy by setting forth the conditions on which foreign nationals can travel to India for surrogacy '*to ensure that the surrogate mother is not cheated*'.⁴⁸⁶ Indian surrogacy clinics have been notified that they must register with the Indian Council for Medical Research and ensure their foreign patients have the visa before giving any treatment. Surrogacy clinics are, in other words, being given responsibility for enforcing the new visa requirements. Foreign embassies were informed of the new guidelines in a circular sent by the Ministry in July 2012.

To obtain the medical visa, the Indian authorities set out the following conditions:

- i. The commissioning parents must be a man and woman, married for at least two years. Applications are restricted to heterosexual couples.
- ii. The commissioning parents' home embassy must provide a letter confirming that their country recognises surrogacy and that any child born will be entitled to enter the parents' home country.⁴⁸⁷ Applicants must also cite evidence that surrogacy is legal in their home country.

483 'India Limits Surrogacy Visas to Married Couples' *BioNews* 21 January 2013 available at: <www.bionews.org.uk/page_242618.asp>.

484 As to the type of visa for foreign nationals intending to visit India for commissioning surrogacy and conditions for grant visa for the purpose, see <<http://boi.gov.in/content/surrogacy>>. The General Instructions for Registration by Foreigners are available at: <<http://boi.gov.in/content/general-instructions-registration-foreigners>>.

485 'India Clarifies Stand on Surrogacy VISA Regulation' 21 August 2012 available at <www.blog.indiansurrogacylaw.com>.

486 *Ibid.*

487 *E.g.*, the British High Commission has issued a letter for this purpose.

- iii. The couple must undertake to care for the child.
- iv. The clinic must be recognised by the Indian Council of Medical Research.
- v. The couple must have a notarised surrogacy agreement with their surrogate mother.
- vi. The couple must be informed that they need an exit visa under Indian law to take their child out of India after the birth, and to get that, they must have taken custody of their child and discharged all their responsibilities as per their surrogacy agreement.
- vii. The applicants must demonstrate that their home country would recognise the child born of the surrogacy arrangement as their biological child. The need for an exit visa was deemed necessary after a number of cases where children born of surrogacy arrangements were left 'stateless'.

In addition to the Draft Bill, one Indian state also has draft legislation pending. The Maharashtra Assisted Reproductive Technology (Regulation) Bill 2011 was introduced in the State Legislature of Maharashtra.⁴⁸⁸ The draft of the bill has not been publicly released, but it is reported to include the following provisions:

- i. A surrogate would have to register as a patient at a state government-run ART clinic in order to establish transparency.
- ii. Only a married woman (25-35 years) may become a surrogate.
- iii. Surrogacy would be prohibited for women who have more than five children.
- iv. The state government will certify the medical fitness of women serving as surrogates.
- v. And international clients would have to obtain a letter from their embassy stating that surrogacy is accepted in the country concerned.

It should be noted that both bills are broadly silent with respect to the specific protections for surrogates, focusing instead on what the surrogate is to do for the commissioning couple. As yet, there is no reported decision (domestically or internationally, within the research jurisdictions) as to the application of these requirements and the status of the Draft Bill remains unknown.

India is a surrogacy 'hotspot' with a booming transnational commercial enterprise, linking multiple individuals and their interests in an interconnected global web: mostly gametes, infants, medical services, surrogate hostels, legal contracts, state, and national policy makers. Nayak comments that the need for free and informed choice is key to protecting the interests of Indian surrogates.⁴⁸⁹ In identifying obvious and hidden risks in India, including the death of a surrogate and a young egg donor, Nayak questions the

488 M. Porecha, 'Surrogacy Bill Tabled', *The Free Press Journal* (Mumbai, 18 December 2011), available at: <www.freepressjournal.in/news/38089-Surrogacy-Bill-tabled.html>.

489 P. Nayak, 'The Three 'M's of Commercial Surrogacy in India: Mother, Money, and Medical Market' in S. DasGupta and S. Das Das Gupta (eds.) *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014), 1-22.

meaning of ‘choice’ in the context of participation in surrogacy arrangements when a surrogate lives below the poverty line. For Vora, the relationships between the commissioning parents and the surrogate (and the surrogate and the child) are, based on her research, temporary, contracted, and carry with them distinct qualities of a new type of neo-colonisation.⁴⁹⁰

Although commercial surrogacy is accepted, there are no laws that govern surrogacy in India, which results in limited rights and protections for surrogates and clinics and intermediaries having few formal responsibilities. The Committee on the Rights of Child considered the realities of surrogacy as part of its Periodic Review of India. In a statement published on 3 June 2014,⁴⁹¹ the Committee reported: ‘*On the Optional Protocol on the sale of children, child prostitution and child pornography, Committee Experts asked questions about legislation and cooperative measures to combat trafficking in persons, as well as the sale of children through surrogacy and adoption.*’ The Committee was deeply concerned about discrimination, and emerging issues such as surrogacy, adoption, and alternative care and noted that ‘*[i]mplementation of legislation was key.*’ The Committee urges India to ‘*(f) [e]nsure that the Assisted Reproductive Technology Bill or other legislation to be developed contain provisions which define, regulate and monitor the extent of surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption.*’⁴⁹²

3.10 CALIFORNIA (USA)

3.10.1 Overview of the domestic approach to surrogacy⁴⁹³

There is no overarching federal law on surrogacy in the USA. As a result, the determination of parenthood and the validity and enforceability of surrogacy agreements are subject to state laws. The approach across the individual states (and the counties within each state) varies from complete prohibition to acceptance in different degrees. Some US state legislatures, however, have entirely abstained from action, leaving the matter to the courts. Other state legislatures have been active on the subject. Florida, Nevada, New Hampshire, and Virginia, for example, have statutorily permitted the enforceability of surrogacy con-

490 K. Vora, ‘Medicine, Markets and the Pregnant Body: Indian Commercial Surrogacy and Reproductive Labor in a Transnational Frame’ [2010] Scholar & Feminist Online.

491 Available at: <www.ohchr.org/AR/NewsEvents/Pages/DisplayNews.aspx?NewsID=14663&LangID=A>.

492 CRC/C/OPSC/IND/CO/1.

493 The author is grateful to and acknowledges his discussions with Californian attorney and fertility lawyer Richard B. Vaughn, Esq., of International Fertility Law Group Inc. (California). For a comprehensive overview of the US approach to surrogacy, see C. Spivack, ‘USA’ in F. Moneger, *Gestation pour autrui: Surrogate Motherhood* (International Academy of Comparative Law 2010).

tracts but not the payment of surrogates.⁴⁹⁴ Along with California, Illinois is often described as one of the most ‘surrogacy-friendly’ states in the US. Illinois permits both surrogacy contracts and reasonable compensation.⁴⁹⁵ In 2004, Illinois enacted the Gestational Surrogacy Act (GSA), which came into force in 2005. The GSA pertains to gestational surrogacy agreements only, with traditional surrogacy agreements falling outside the auspices of the legal framework. The primary motivation for introducing this legislation appears to have been to provide legal certainty about parenthood for children born through gestational surrogacy arrangements.⁴⁹⁶ On the other hand, many states have attempted, with varying degrees of success, to legislatively prohibit the enforcement of surrogacy contracts entirely, whether by banning or voiding them. This group includes Arizona, the District of Colombia, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Utah.⁴⁹⁷ Some US state jurisdictions hold that intent manifested in a surrogacy agreement offers a third way – besides procreation and adoption – that parenthood can be established. For example, Nevada law allows for surrogacy contracts and states that a ‘*person identified as an intended parent in a [surrogacy] contract must be treated in law as a natural parent under all circumstances.*’⁴⁹⁸

In those US states in which surrogacy arrangements are legal and enforceable, the attribution of parental status is nonetheless subject to regulation. Parentage is firmly anchored in law and is not subject to individual renegotiation.

State courts have also played significant roles in resolving issues associated with surrogacy.⁴⁹⁹ One judicial trend noted by commentators is a reluctance to uphold commercial surrogacy agreements as against public policy. For example, in the famous surrogacy case of *Baby M*, the Supreme Court of New Jersey determined that, under state law, ‘*the payment of money to a ‘surrogate’ mother [is] illegal, perhaps criminal, and potentially degrading to women.*’⁵⁰⁰ Accordingly, the Court upheld a woman’s right to change her decision after she agreed, under a surrogacy contract, to be artificially inseminated with a man’s sperm

494 K. Tuininga, ‘The Ethics of Surrogacy Contracts and Nebraska’s Surrogacy Law’ [2008] 41 Creighton Law Review 185, 189 (providing background on the preceding states’ differing approaches to surrogacy).

495 Illinois has legislation which sets out the terms of legally valid gestational surrogacy agreements. Under the Illinois legislation, legal parenthood can be framed prior to the child’s birth, so that the intended parent(s) is/are the legal parents upon the child’s birth. This makes the Illinois legislation similar to the legal frameworks in Greece and South Africa.

496 See H. Joseph Gitlin (2010) ‘Illinois Becomes Surrogacy Friendly’ comment paper published on the American Academy of Matrimonial Lawyers website, available at: <www.aaml.org>.

497 *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (determining that it was unconstitutional, on equal protections grounds, that the state’s surrogacy statute permitted the intended father to rebut the surrogate’s husband’s parentage, but not the intended mother to do the same).

498 Nev. Rev. Stat. 126.045 (2001).

499 But see *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993) (‘It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so.’).

500 *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988). *Baby M* catalysed legislative efforts in other states on the subject of surrogacy.

and to surrender the baby to him and his wife.⁵⁰¹ Nonetheless, in the circumstances of the case and based on a determination of the child's best interests, the intended parents were awarded custody of the child and the surrogate mother was awarded potential visitation rights. State courts have also been called upon to determine the parentage of children resulting from surrogacy, often being requested to issue pre-birth parentage orders declaring the intending parents to be the legal parents before the child is born.⁵⁰²

Spivack succinctly assesses the US approach as follows:

The law of surrogate motherhood in the United States is in a state of flux and confusion. States have widely differing laws, some enforcing surrogacy contracts, some banning them entirely, and some allowing them under certain circumstances. Many states have no laws regarding surrogacy contracts at all. No single statutory regime has won widespread acceptance. As a result, courts are often left to decide parenthood disputes arising from these contracts, and employ a range of theories by which to do so: intent, contract, genetics, gestation and, rarely, best interests of the child.⁵⁰³

Reference should be made to the National Conference of Commissioners on Uniform State Laws, which has drafted a model uniform act, the Uniform Parentage Act (UPA).⁵⁰⁴ The UPA deals with parentage in the context of surrogacy⁵⁰⁵:

SECTION 807. PARENTAGE UNDER VALIDATED GESTATIONAL AGREEMENT.

(a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

- (1) Confirming that the intended parents are the parents of the child;
 - (2) If necessary, ordering that the child be surrendered to the intended parents;
- and

⁵⁰¹ *In re Baby M*, 537 A.2d at 1251.

⁵⁰² S. Snyder and M. Byrn, 'The Use of Pre-birth Parentage Orders in Surrogacy Proceedings' [2005] 39 Family Law Quarterly 633, 634.

⁵⁰³ *Ibid.*, 173 (C. Spivack, 'USA').

⁵⁰⁴ Available at: <www.aals.org/profdev/family/sampson.pdf>. Although each of the states has some sort of parentage act, only seven states, Delaware, Texas, Washington, North Dakota, Utah, Oklahoma, and Wyoming, have enacted the model law.

⁵⁰⁵ Uniform Parentage Act (2000) §8, 9B Uniform Laws Annotated 295, 360-370 (2001). The Act was revised in 2002, Uniform Parentage Act (2000) (as amended in 2002), 9B Uniform Laws Annotated: 2009 Cumulative Annual Pocket part 4-78 (2009).

- (3) Directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.
- (b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

The UPA defines the parent-child relationship as the legal relationship existing between a child and the child's parents, and it governs proceedings to establish that relationship. A party to an assisted reproduction agreement may bring an action under the UPA at any time to establish a parent and child relationship consistent with the intent expressed in the agreement. California adopted the general provisions of the UPA (as amended in 1992 and 2002).⁵⁰⁶ In early 2013, the Californian legislature adopted new legislation that provides additional guidance relating to the manner in which surrogacy agreements must be executed, when medical procedures can be commenced, and where parental establishment cases may be filed. Although some of the procedures were, it is understood, already utilised by experienced-assisted reproduction practitioners, they were not required by statutory law. So, in essence, the law creates clear guidance and codifies best practices. In the context of surrogacy, pre-birth parentage determinations and orders are specifically authorised by California Family Code, which states that '*[a]n action under this chapter may be brought before the birth of the child.*'⁵⁰⁷ California has specific legislation on surrogacy (effective since 1 January 2013⁵⁰⁸), and the seeming validity of a surrogacy contract results, historically, from case law.⁵⁰⁹ The intended parents have to undertake action in the courts before the birth of the child in order to obtain a 'pre-birth judgment' establishing their parentage with regard to the child born of the surrogacy contract. It is now clear that gestational surrogacy is legal in California provided appropriate rules are followed.

3.10.2 *Legal parenthood in the context of surrogacy*

As California is considered to be a surrogacy 'hotspot', the discussion below focuses on Californian law and practice as it relates principally to non-Californian resident intended parents (i.e., inter-country or inter-state surrogacy arrangements rather than domestic instances of surrogacy) as well as the regulatory framework that has been adopted in California.

⁵⁰⁶ Cal. Fam. Code §§ 7600-7730.

⁵⁰⁷ Cal. Fam. Code §§ 7600-7730.

⁵⁰⁸ California Assembly Bill 1217.

⁵⁰⁹ E.g., *Johnson v. Calvert*, 851 P 2d 776, 783, 5 Cal. 4th 84, 95 (Cal. 1993). See Section 7962 Family Code.

(a) The grounds for legal maternity and the grounds for legal paternity or parenthood of the second parent

If intending parents enter into a gestational surrogacy arrangement that complies with California law and designates them as the child's parents, they will be the legal parents of the surrogate-born child regardless whether the child is conceived from their eggs or sperm. California in 2012 took the legislative step of changing the legal definition of 'intended parent' to be 'an individual, married, or unmarried,' making it legislatively illegal to discriminate against same-sex parents both before and after their children are born from surrogacy arrangements. In other words, intending parents (heterosexual, homosexual, or an individual) engaged in gestational surrogacy can use donated eggs, donated sperm, or both as part of the surrogacy and be the legal parents of the child. If the conditions (as discussed below) are not satisfied, the surrogate would be treated as the legal mother at birth and her husband (provided her consented to the arrangements) as the presumed legal father.

Assuming the child was conceived and is delivered in California, the intending parents will be able to get a judgment declaring them legal parents prior to the child's birth in place of the surrogate and, if applicable, her husband.⁵¹⁰ Such a judgment will determine, among other things, whose names are to be placed on the birth certificate and who is responsible for medical decisions and costs affecting the new born.⁵¹¹

Courts often take a month or less to process these applications, and most California courts are granting pre-birth surrogacy judgments on the papers, with no actual court appearance required. Californian law provides that a court action to determine parentage of a child born through gestational surrogacy can be brought in the county where the intending parents live, the county where the child was conceived, the county where the surrogate lives, or the county where the child is born.⁵¹² This usually gives the parties at least a couple of choices of appropriate venues for their application. The timeframe to obtain a judgment can take several months, mostly due to the court's availability to review the documents and/or set the matter for hearing. To obtain the pre-birth order, the paperwork is filed with the court between the fourth and seventh months of the surrogate's pregnancy.

It is important to note that even though many California courts are routinely issuing pre-birth judgments in surrogacy cases, these judgments are not technically effective until

510 It is understood that a strategy employed by intending parties with no genetic connection with the planned surrogate-born child is to ask a court for a determination of parentage before the child is born to the surrogate.

511 See <www.callawyer.com/Clstory.cfm?eid=926465&wteid=926465_Whose_Pregnancy_Is_It?#sthash.G9ORbRSL.dpuf>.

512 Section 7960 et seq. of the California Family Code, the Intended Parents may file a parentage action "in the county where the child is anticipated to be born, the county where the surrogate resides, the county where the Intended Parents reside, the county where the assisted reproduction Agreement is executed, or the county where the medical procedures pursuant to the Agreement are to be performed".

a baby is born; this approach would, it seems, appear to avoid a legal conflict over medical decision-making prior to birth. Therefore, the surrogate remains in full control over her prenatal care and medical choices prior to the moment of delivery, contingent on whatever the contract between surrogate and intended parents specifies in this regard.

(b) Relevant case law

There are three key appellate decisions in California that define the state's position on surrogacy and serve as background to the Californian statutory rules: *Johnson v. Calvert*,⁵¹³ *In re Marriage of Moschetta*,⁵¹⁴ and *In re Marriage of Buzzanca*.⁵¹⁵ Each decision addresses surrogacy law in the context of heterosexual, married couples. After the California Supreme Court's recent rulings on three lesbian custody cases, it is assumed that the court would apply these decisions to registered domestic partners, if not to any committed gay couple, but it appears that the applicability of surrogacy law to same-sex couples has never been explicitly addressed by any California appellate court.

In *Johnson v. Calvert*, a surrogate became pregnant using an embryo created with the intended parents' egg and sperm, so both intending parents were genetically related to the child. The relationship of the parties deteriorated during the pregnancy, and the surrogate threatened to keep the child.⁵¹⁶ The California Supreme Court characterised the actions of the parties as a contested gestational surrogacy case in functional terms:

Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change

513 *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

514 *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

515 *In re Marriage of Buzzanca* (1998) 61 Cal. App. 4th 1410 [72 Cal. Rptr. 2d 280] available at: <<http://law.justia.com/cases/california/caapp4th/61/1410.html>>.

516 *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

of heart should vitiate the determination that Crispina is the child's natural mother.⁵¹⁷

The intending parents initiated a pre-birth parentage proceeding asking the court to declare them to be the child's legal parents prior to birth. In ultimately deciding the case, the California Supreme Court first determined that the relevant provisions of California's parentage act did govern the determination of maternity in a surrogacy proceeding even though a surrogacy arrangement was never contemplated in 1975 when California first adopted the UPA. The Court then ruled that the surrogate and the intending mother each had successfully established a valid presumption of maternity under the act: the surrogate as the child's birth mother and the intending mother as the child's genetic mother. Finding that neither presumption outweighed the other, the Court ruled that the original intent of the parties was the factor that resolved the legal impasse between the competing presumptions in the intending mother's favour. With respect to the surrogacy agreement, the Court held that '[t]he [surrogacy] agreement is not, on its face, inconsistent with public policy' but declined to rule on the validity of the agreement itself. The *Calvert* majority held that in the determination of parentage, the best interests of the child standard did not apply because '*such an approach raises the repugnant spectre of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede and should not be dictated by eventual custody decisions.*'

The argument for deciding legal parenthood on the explicit basis of intention (discussed further at 3.13 below) can be traced back to this Court's decision in *Calvert*. Strathern has pointed to the language of the Supreme Court Judges to suggest that their 'idea' to have a child was given precedence over the surrogate's claim to be the legally recognised mother (even though the Court agreed that both women had presented acceptable proof of maternity): '*In abstracting parents from the birth, the doctrine of intent allows medical technology to appear as enabling of natural inclinations as it does of biological functions.*'⁵¹⁸

California also has case law confirming the view that a pre-birth parental order in favour of an intending mother is inappropriate where she is neither the genetic nor the birth mother of the child. In *Moschetta*, the California Court of Appeals was faced with litigation among the divorcing intended parents and the surrogate as to who was the child's legal mother. The Court again applied the provisions of the California parentage statutes. The Court first determined that there were no competing parentage presumptions between the surrogate and the intending mother since the intending mother was neither the birth

⁵¹⁷ *Ibid.*

⁵¹⁸ M. Strathern, *Kinship, Law and the Unexpected: Relatives are Always a Surprise* (Cambridge University Press Cambridge 2005) 57.

nor genetic mother of the child. As a result, there was no dispute as to maternity for the Court to decide in the case. The Court also alluded to the fact that the intending mother would have to adopt the child in order to become its legal parent and that the surrogacy agreement cannot serve as an adoption agreement since it did not comply with the statutory consent requirements for adoption.

Thus, pre-birth parentage determinations are clearly permitted under California's statutory scheme. Such parents who seek a pre-birth determination of parentage in their favour in California with the acquiescence and cooperation of the surrogate would succeed in light of the success of the intending parents in *Johnson v. Calvert*, which was a contested case. This would also presumably be the case in other jurisdictions in which there are no statutory provisions governing surrogacy and pre-birth orders are permitted under the governing paternity/maternity statutes.⁵¹⁹

In 1998, *In re Marriage of Buzzanca*, a California Court of Appeal found that a father who had agreed to a surrogacy arrangement was the resulting child's father and responsible for child support (maintenance) despite the fact that the couple had divorced; the wife had agreed to assume responsibility for the child's care; the surrogacy contract had not been signed at the time of implantation and conception; and the father, not having contributed the sperm, had no genetic relationship to the child. The Court insisted that it was not ruling on the public policy aspects of surrogacy contracts – in fact, it was adamant that it was not concerned with the enforceability of the contract at all. Rather, it said, it was determining parenthood with reference to the '*consequences of those agreements as acts which caused the birth of a child.*'⁵²⁰ The Court applied the settled body of law under the Uniform Parentage Act that applied to artificial insemination: when a husband consents to his wife's IVF, he is deemed the father of the child, because the medical procedure which produced the child was set in motion and intended by the putative parents. The husband's consent makes him '*directly responsible*' for the child's existence, and he knows that '*such behaviour carries with it the legal responsibilities of fatherhood and criminal responsibility for non-support.*' Six individuals thus had a potential interest in the child (the egg donor, sperm donor, intended mother, intended father, surrogate, and husband of the surrogate). In its analysis, the Court relied on the intent rather than the genetic connections of the parties when it found the intended parents to be the lawful parents of the child. This Court bolstered its decision with the common law doctrine of estoppel, noting the doctrine's distaste for inconsistent actions like '*consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility.*'⁵²¹ The Court also found that the intending father's wife was the child's mother.

519 C. Spivack, 'USA' in F. Moneger, 'Gestation pour autrui: Surrogate Motherhood' [2010] 14 International Academy of Comparative Law.

520 *Ibid.*

521 *Ibid.*, 1420.

Building on these decisions, the California Supreme Court decided three cases concerning lesbian couples who had children via surrogacy. Pursuant to the UPA, the Court ruled that two women can be the legal parents of a child.⁵²² Problems arise if the couple then separates, sometimes leading to court determinations of parental rights; at that point, it is possible to see the gestational carrier as a surrogate for the other partner. Based on the above case law, courts should look at the non-genetically related partner as having established a parent-child relationship through intent and actions. In *Elisa B. v. Superior Court*, a former same-sex partner denied being a legal parent to twins born to the other partner during the relationship, despite an agreement that each woman would raise the children as her own.⁵²³ The custodial mother filed for state support, and the state brought an action to recover child support from the defendant. The issue of state support seems to have been dispositive in this case, given the strong policy against allowing children to become public charges, and it may not set precedent for determining same-sex non-biological parenthood where public monies are not an issue.

3.10.3 Surrogacy agreements

The provisions outlined in the statutory law (considered below) clarify for courts what constitutes a properly executed surrogacy agreement. Provided the terms of the agreement are fair, case law supports the enforcement of the surrogacy agreement. To provide for greater legal certainty and statutory protections for the intended parents and the surrogate with respect to the terms and enforceability of surrogacy agreements in California, section 7962 of the Family Code provides⁵²⁴:

522 *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (2005); *Kristine H. v. Lisa R.*, 37 Cal. 4th 156 (2005); and *K.M. v. E.G.*, 37 Cal. 4th 130 (2005).) The rulings apply to all lesbian, gay, bisexual, and transgender people. See <www.callawyer.com/Clstory.cfm?eid=926465&wteid=926465_Whose_Pregnancy_Is_It?#sthash.G9ORbRSLdpuf>.

523 117 P. 3d 660,663 (Cal. 2005).

524 At a federal level, Article 8 Uniform Parentage Act (as amended) reads: 'Section 801. Gestational Agreement Authorized.

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that: (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction; (2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and (3) the intended parents become the parents of the child. (b) The intended parents must be married, and both spouses must be parties to the gestational agreement. (c) A gestational agreement is enforceable only if validated as provided in Section 803. (d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse. (e) A gestational agreement may provide for payment of consideration. (f) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or foetus.'

7962. (a) An assisted reproduction agreement for gestational carriers shall contain, but shall not be limited to, all of the following information:

(1) The date on which the assisted reproduction agreement for gestational carriers was executed.

(2) The persons from which the gametes originated, unless anonymously donated.

(3) The identity of the intended parent or parents.

(b) Prior to executing the written assisted reproduction agreement for gestational carriers, a surrogate and the intended parent or intended parents shall be represented by separate independent licensed attorneys of their choosing.

(c) The assisted reproduction agreement for gestational carriers shall be executed by the parties and the signatures on the assisted reproduction agreement for gestational carriers shall be notarized or witnessed by an equivalent method of affirmation as required in the jurisdiction where the assisted reproduction agreement for gestational carriers is executed.

(d) The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure, or commence injectable medication in preparation for an embryo transfer for assisted reproduction purposes, until the assisted reproduction agreement for gestational carriers has been fully executed as required by subdivisions (b) and (c) of this section.

(e) An action to establish the parent-child relationship between the intended parent or parents and the child as to a child conceived pursuant to an assisted reproduction agreement for gestational carriers may be filed before the child's birth and may be filed in the county where the child is anticipated to be born, the county where the intended parent or intended parents reside, the county where the surrogate resides, the county where the assisted reproduction agreement for gestational carriers is executed, or the county where medical procedures pursuant to the agreement are to be performed. A copy of the assisted reproduction agreement for gestational carriers shall be lodged in the court action filed for the purpose of establishing the parent-child relationship. The parties to the assisted reproduction agreement for gestational carriers shall attest, under penalty of perjury, and to the best of their knowledge and belief, as to the parties' compliance with this section in entering into the assisted reproduction agreement for gestational carriers. [...]

(2) Upon petition of any party to a properly executed assisted reproduction agreement for gestational carriers, the court shall issue a judgment or order establishing a parent-child relationship, whether pursuant to Section 7630 or otherwise. The judgment or order may be issued before or after the child's or children's birth subject to the limitations of Section 7633. Subject to proof of

compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section. [...]

A surrogacy agreement (termed an '*assisted reproduction agreement for gestational carriers*') executed in accordance with this section is presumptively valid and enforceable and shall not be rescinded or revoked without a court order. However, section 7692 confirms the need for the surrogate and the intending parents to be represented by separate independent licensed attorneys before entering into an assisted reproduction agreement which, in addition to containing some detailed information (date of execution of the contract, the egg donor's or sperm donor's identity, if not anonymous, and the intended parents' identity), shall be executed by the parties, as well as the signatures on the surrogacy contract shall be notarised as required in the jurisdiction where the assisted reproduction agreement for gestational carriers is executed.

An assisted reproduction agreement for gestational carriers must therefore address the following:

- i. The source of the gametes. If an egg or sperm donor is used, that must be indicated, and if the intended parents are a gay male couple, for example, the agreement should specify whether the sperm of one of the intended fathers is being used. However, it appears sufficient to record that the eggs or sperm come from an anonymous donor – no identifying information is required under these circumstances.
- ii. What is the surrogate being compensated for, and how much is she being compensated? Typically, a surrogate is paid a 'base fee' for her gestational services and then is additionally compensated for things such as medical procedures, carrying multiples (twins or triplets), travel expenses, lost wages, maternity clothing, legal fees, provision of breast milk, etc.
- iii. Who will hold escrow? Under California law, the surrogacy agency cannot hold the funds. Surrogacy funds must be held by either a licensed attorney (who will hold the funds in a state-registered legal trust account that is governed by State Bar rules) or a licensed, bonded escrow company. This is to protect both intended parents and the surrogate from the funds disappearing in the middle of the surrogacy process. Some attorneys for the intended parents will hold escrow, but many will not because they

believe this is a conflict of interest. If there is a conflict between the surrogate and the intended parents over payment of fees or expenses, the attorney for the intended parents needs to be available to advocate for the intended parents, and this may be inherently inconsistent with the neutral role of a person holding the funds in a fiduciary capacity.

It is very likely that the agreement will also address the following:

- i. The expected behaviour of the intended parents and the surrogate. A surrogacy agreement generally will set out behaviour expectations for intended parents and surrogate including compliance with all medical directives, dietary and travel restrictions during pregnancy, agreements on communication about the pregnancy, and attendance at prenatal visits, for example, who will be in the delivery room, etc.
- ii. Legal parentage. The surrogacy agreement will likely record the agreement of the surrogate (and her husband) that the intended parents will be the legal parents and the surrogate (and her husband, if she has one) will not, and the agreement will also set out the plan for ensuring that parentage is established in a timely manner and pursuant to the laws of California.
- iii. Under section 3030 of the Family Code, absent the Court's finding that there is no significant risk to the child, the Court will not award physical or legal custody of a child born through a surrogacy arrangement to an intended parent that has been convicted of a crime with a sexual component such that the intended parent is a registered sex offender or would be required to register as a sex offender under any state or federal law in the United States or an intended parent's home country.

A surrogacy agreement may not, however, address each and every eventuality. One case involving a number of difficult issues did occur in 2001, suggesting that in reality, contractual details are difficult to enforce in situations as emotional and complicated as bringing children into the world. A British woman, Helen Beasley, agreed to be paid \$20,000 to be a surrogate for a Californian couple, Charles Wheeler and Martha Berman.⁵²⁵ Beasley became pregnant with an embryo created from Wheeler's sperm and a donated egg. One of the clauses of the parties' detailed surrogacy agreement stipulated that Beasley would abort any additional fetuses if she had a multiple pregnancy. Beasley alleged that she had an oral agreement with the couple that no abortion would take place after 12 weeks of gestation. Beasley, Wheeler, and Berman were informed in the eighth week of Beasley's pregnancy that she was carrying twins; however, Wheeler and Berman did not discuss abortion with her until she was 13 weeks pregnant. Beasley felt it was wrong to terminate a foetus at that stage of the pregnancy and was concerned about the risk a termination

⁵²⁵ Cited in C. London, 'Advancing a Surrogate Focused Model of Gestational Contracts' [2012] 18 *Cardozo Journal of Law and Gender* 391.

would have on the remaining foetus. Wheeler and Berman refused to accept Beasley's decision and told her she would have to terminate one foetus as requested or they would refuse to accept two babies. Because they did not want to separate the babies, they told Beasley that both children would be her responsibility and she would not get paid. As had been agreed, Beasley moved – temporarily – from the UK to California, where she would not be considered the legal mother of the twins at birth. Beasley could not afford to raise two more children and did not want to keep the twins. However, the fact that she would not be the twins' legal mother meant that she would not be able to place them for adoption, leaving the babies with no parents willing to take care of them. Wheeler and Berman asked Beasley for \$80,000 in expenses for allegedly breaching their contract; Beasley filed a civil lawsuit asking for damages for emotional distress and breach of contract. At the same time, she filed in the family court for Wheeler and Berman's parental rights to be revoked so that she could put the twins up for adoption. The twins were eventually adopted by another couple, and the Californian court ordered Wheeler and Berman to pay Beasley civil damages of \$6,500.⁵²⁶

3.10.4 *Payments in surrogacy*

No official data are available, but reports indicate that surrogates are paid between USD\$25,000 and USD\$50,000 per pregnancy, while associated costs (insurance, medical, legal costs) paid by intending parents can range from USD\$50,000 to USD\$150,000.⁵²⁷ The fees and costs are, however, likely to be much higher in practice. In the English case of *J v. G* (2013),⁵²⁸ a British commissioning parents engaged a surrogate in California. In that judgment, it was reported that the surrogate had been paid \$56,750 plus expenses for her inconvenience and insurance.

The Academy of California Adoption Lawyers and the Academy of California Family Formation Lawyers comment:

While it is not permissible to pay surrogates for eggs and/or genetic material and/or for any relinquishment of parental rights, the standard of practice in California is that it is permissible to pay surrogates for pain, suffering, inconvenience, lost wages, travel expenses, miscellaneous living expenses and for the pre-birth support of the child. While many surrogates, such as family members and friends, prefer not to be paid, the compensation to a paid surrogate in

⁵²⁶ *Ibid.*

⁵²⁷ Council for Responsible Genetics, 'Surrogacy in America' 2010, available at: <www.councilforresponsible-genetics.org/pagedocuments/kaevej0a1m.pdf>.

⁵²⁸ EWHC 1432. See, *infra*, section on the UK.

California is typically in the range of \$15,000 to \$25,000, plus various additional payments.⁵²⁹

The financial limit to the arrangements, it seems, is that of the financial resources of intending parents.

3.10.5 *Advertisement*

As California is a surrogacy-friendly jurisdiction, it is unsurprising that advertising with respect to surrogacy is permitted. The practice of surrogacy facilitators (as defined below) is regulated in that it requires a non-attorney surrogacy facilitator to direct his or her client to deposit client funds in an independent, bonded escrow account or a trust account maintained by an attorney, subject to specified withdrawal requirements. Section 7960 of the Californian Family Code reads:

For purposes of this part, the following terms have the following meanings:

(a) ‘Surrogacy facilitator’ means a person or organization that engages in either of the following activities:

(1) Advertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement.

(2) Charging a fee or other valuable consideration for services rendered relating to an assisted reproduction agreement.

(b) ‘Non-attorney surrogacy facilitator’ means a surrogacy practitioner who is not an attorney in good standing licensed to practice law in this state. [...]

(d) ‘Fund management agreement’ means the agreement between the intended parents and the surrogacy facilitator relating to the fee or other valuable consideration for services rendered or that will be rendered by the surrogacy facilitator.

While there are specific restrictions that apply to adoption agencies, these, it seems, do not, on the face of the rules, apply necessarily to surrogacy facilitators.⁵³⁰

529 FAQs available at: <<http://acal.org/faqs/regarding-assisted-reproduction-technology-law.php>>.

530 Use of Advertisement Citation: Family Law § 8609(a): ‘No person or organization may advertise in any periodical or newspaper or by radio or other public medium that he, she, or it will place or provide children for adoption or cause any advertisement to be published in any public medium soliciting, requesting, or asking for any child or children for adoption, unless that person or organization is licensed to place children for adoption by the department. Use of Intermediaries/Facilitators.’

3.10.6 *Nationality of the child*

The Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵³¹

If a child is born to a US-resident surrogate in the US, that child is a US person without further action. The child is entitled to a US passport in accordance with US federal immigration and constitutional law, which is likely to be a significant factor for intending parents when considering the choice of jurisdiction for surrogacy.

The requirements for passports for minors under 16 are governed by 22 Code of Federal Regulations (CFR) section 51.28. Essentially, the legal parents of the child must both consent to the passport application unless one of the exceptions enumerated under 22 CFR 51.28 exist. If, under Californian law, a surrogate is considered the legal mother of the surrogate-born child, then the surrogate would need to consent to the issuance of a passport for the minor child or one of the exceptions to the consent rule would have to be met.⁵³²

For US national intending parents engaging with surrogates outside of the USA, US Federal law establishes, for the purpose of acquisition of citizenship by descent, that the child born abroad to a surrogate mother is considered the child of the woman with whom the child is genetically related and requiring a genetic relationship with one American citizen for the transmission of citizenship by descent (irrespective of whether the child was born in a wedlock or outside a wedlock).⁵³³ A US citizen parent who has a genetic child overseas, including via a foreign surrogate mother, may apply for a Consular Report of Birth Abroad of an American Citizen (CRBA) and a US passport for the child at the US Embassy or Consulate in the country where the child was born.⁵³⁴ A CRBA certifies that a child born abroad is a US citizen. A CRBA does not determine the identity of the child's legal parents. Therefore, in general, the name/s listed on the CRBA is/are the US citizen parent(s) with a genetic connection to the child. A second parent may be listed on the CRBA if the second parent demonstrates a legal parental relationship to the child under

531 Available at: <www.usconstitution.net/xconst_Am14.html>.

532 *Ibid.*

533 8 U.S.C. §§ 1401-1409 (2011). See, generally, U.S. Dep't Of State, 7 Foreign Affairs Manual 1131.4-2 available at: <www.state.gov/m/a/dir/regs/fam/>.

534 See <<http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html>>.

local law; the CRBA does not, however, serve as a record of that individual's status. If the Embassy or Consulate determines that the child is a US citizen, he or she will need a US passport to enter the USA. As part of the application process, the parents must provide evidence to the local US Embassy or Consulate of the child's birth and citizenship. In an ART case, the parents may be requested to provide medical and documentary evidence of the child's conception and birth and such other evidence as would demonstrate the genetic connection between parent and child, along with evidence of the parents' identity, citizenship, physical presence in the USA, and legal status as the child's parent under local law.

3.10.7 *Birth registration and records*

In the US, it is the hospital's duty to register the birth of any children born at that hospital. This means that a full-time registrar will be at the hospital that will come to the ward or hospital room within 24 hours of birth. This form is signed by the intended parents and by the delivering doctor. Once this has been done, the registrar will forward the paperwork to the California State Department of Vital records, where the birth certificate will be produced. For births occurring within the State of California, the Office of Vital Records requires that the birth mother's address be noted on the confidential portion of the birth certificate. This is done for statistical purposes only to track the number of births throughout the different regions/counties/cities of California; it is understood that the birth certificate obtained will not show this information.

3.10.8 *National considerations*

In California, surrogacy is an option for single people, unmarried and married couples, and gay or heterosexual couples. While California is depicted as a very favourable surrogacy jurisdiction, the state of the law boils down to two questions: Will the pre-birth parentage decision be enforced, that is, will the surrogate be forced to comply with its requirement that she relinquish parental rights? And in the context of inter-country surrogacy, to what extent does the current law respond to the very real (albeit extraterritorial) difficulties faced by foreign intending parents who engage with a Californian-based surrogate? Indeed, the legislation in California appears to be 'silent' regarding inter-country surrogacy.

PART TWO

Having examined the rules concerning the establishment of legal parentage and nationality at birth in the context of (inter-country) surrogacy as well as the approaches to surrogacy

in the research legal systems, the focus now shifts to consider what conclusions can be drawn from the comparative review in order to identify any common approaches and problem areas. The aim is to find common ground so as to (hopefully) bring the opposing poles of the surrogacy debate into a constructive dialogue about how best to respond to surrogacy.

3.11 ANALYSIS OF FINDINGS

Due to the dearth of specific legislation clarifying the civil status of the child following surrogacy, there are differing interpretations as to how filiation in these cases should be established or conferred and, in most cases, these interpretations often result in a delay (in certain cases, an impossibility) in determining the nationality of surrogate-born children. It follows that, in most of the research jurisdictions (with the exception of the UK and California), legal parental status in respect of the surrogate-born child is uncertain at birth, and this, in turn, implies that the status of the child is uncertain. The legal uncertainty apparent in each of the research jurisdictions (again, with the exception of the UK and California in most cases) results from the policy of discouragement towards surrogacy, particularly commercial surrogacy, that has also been reflected in civil and criminal sanctions. Despite the differences in approach, it is interesting to note that with respect to certain issues, nearly all of the legal systems researched respond in an identical manner (for example, in six of the eight jurisdictions, a surrogacy agreement is regarded as null and void).

3.12 COMPARATIVE TABLE

The table below summarises the result of applying existing law in each of the research jurisdictions to parentage, surrogacy agreements, criminal and civil sanctions, birth records, and nationality in the context of inter-country surrogacy arrangements.

	France	Switzerland	Austria	Belgium	Netherlands	UK	India	USA – California
Regulation	Regulated (statute) – prohibited	Regulated (statute) – prohibited	Regulated (statute) – prohibited	None	None	Regulated (statute) – permissible	Regulated (in part) – permissible	Regulated (statute) – permissible
Legislative arrangements	Law regarding	Constitution	Law on repro-	Law on repro-	None with	Law on Surro-	Guidelines	Californian

	ing the respect for the human body and Civil Code	and law on assisted repro- duction	ductive medicine	ductive health	specific refer- ence	gacy and Human Fertilisa- tion and Embryo- ology Act	(statu- tory law pend- ing)	Family Code
Specific legisla- tive provisions dealing with sur- rogacy	Yes	Yes	Yes	No	No	Yes	No but pending	Yes
Instances of surro- gacy reported in case law	Yes – no devia- tion from policy	Yes – devia- tion from policy (subject to appeal)	Yes – devia- tion from policy (Consti- tutional Court)	Yes	Yes	Yes	Yes	Yes
Criminal and civil sanctions	Yes	Yes	Yes	Yes	Yes	Yes	Unknown	Yes
	France	Switzer- land	Austria	Bel- gium	Nether- lands	UK	India	USA – Califor- nia
Commercial (for profit) surrogacy	Void	Void	Possibly	Void	Void	Void but ‘rea- sonable expenses’ allowed	Valid	Valid
Altruistic surro- gacy	Void	Valid	Valid	Valid	Valid	Valid	Valid	Valid
Enforceability of surrogacy agree- ment	Unen- force- able	Unen- force- able	Unen- force- able	Unen- force- able	Unen- force- able	Unen- force- able	Enforce- able (possi- ble)	Enforce- able (possi- ble)
Establishment of legal parentage by agreement	No	No	No	No	No	No	No	No
Surrogate – legal mother at birth	Yes	Yes	Yes	Yes	Yes	Yes	No, in practice (no statute)	No
Intending mother – motherhood following birth	No	Possibly	Yes	Possibly	Possibly	Yes	Yes	Yes
Intending father – fatherhood fol- lowing birth	No	It is pos- sible through recogni- tion or	Yes	Yes. It is possible through recogni- tion or	Yes. It is possible through recogni- tion or	Yes	Yes	Yes

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

		judicial determi- nation or adop- tion		judicial determi- nation or adop- tion	judicial determi- nation or adop- tion			
Intending co-parent – parentage following birth	No	Yes (if opposite sex)	Yes	Yes	Yes	Yes	Yes (if opposite sex)	Yes
Intending mother – the effect of a genetic relationship with the child – motherhood	Genetic link not determinative of motherhood	Genetic link not determinative of motherhood	Genetic link not determinative of motherhood	Genetic link not determinative of motherhood	Genetic link not determinative of motherhood	One of the prospective parents must have a genetic link with the child	One of the prospective parents must have a genetic link with the child	Possibly
Intending father/second parent – the effect of a genetic relationship with the child – fatherhood/parenthood	No	Genetic link may play a role	Genetic link may play a role	Genetic link may play a role	Genetic link may play a role	As above	As above	Genetic link may play a role
Adoption	Not possible	Possible (opposite-sex married couples only)	Possible	Possible	Possible	Possible	Possible	Possible
Two persons of the same-sex to be the legal parents of a surrogate-born child	No	Possible, recognition of a foreign decision pronouncing a same-sex adoption	Possible	Possible	Possible	Possible	No	Yes
Specific legislative provisions on birth records and history	No	No	No	No	No	Yes	No	Yes
Specific legislative provisions on nationality of surrogate-born child	No	No	No	No	No	Yes	No	Yes

3.13 INITIAL CONCLUSIONS DRAWN FROM THE COMPARATIVE REVIEW IN THE CONTEXT OF PARENTAGE

A number of trends have emerged with respect to each of the research categories.⁵³⁵ To add to the comparative analysis, reference below is also made to other (non-research) legal systems.

3.13.1 *Jurisdictions which are anti-surrogacy: Express prohibition*

In the states which have adopted specific legislation, express provision is made to prohibit surrogacy arrangements on ethical, moral, and public policy grounds. This is the case in France,⁵³⁶ Switzerland,⁵³⁷ and Austria as well as in Germany,⁵³⁸ Italy,⁵³⁹ and Spain.⁵⁴⁰ Even in the absence of specific legislation, such a prohibition may also result from a judicial interpretation of the provisions on the legal establishment of maternity or paternity. Surrogacy agreements are void and unenforceable, and in this group of states, there are often civil and criminal sanctions for third parties involved in facilitating such arrangements and/or for arrangements in which payments have been made although such sanctions, it seems, are not usually extra-territorial in nature.⁵⁴¹

Inter-country surrogacy is particularly problematic in those jurisdictions because surrogacy usually only comes to the attention of authorities after the child has been born. This tends to happen either at consular authorities abroad when the intending parents request a passport or other travel documents for the child or in the intending parents' home state when they have returned with the child and want to apply to register the child or apply to record their parental status.

In terms of parentage, the general rules of legal parentage apply to surrogate-born children. This means that the surrogate is the mother (and legal parent) and usually her

535 See for a detailed discussion and the findings of the Hague Conference, HCCH Prel. Doc. No 10 of March 2012 (for the attention of the Council of April 2012 on General Affairs and Policy of the Conference), 'A preliminary report on the issues arising from international surrogacy arrangements' at 9-25.

536 Article 16-7 French Civil Code.

537 Article 119 Swiss Federal Constitution of 18 April 1999 and Article 4 of the Federal Law on Medically Assisted Procreation of 18 December 1998.

538 Embryo Protection Act of 13 December 1990.

539 Law no. 40 of 19 February 2004. See also Cassazione civile, sez. I, sentenza 11.11.2014 n° 24001. G  n  thique reports that: 'After having been turned down for adoption by the relevant national authorities, a couple in their fifties turned to surrogacy in the Ukraine in 2011 for the sum of   25,000. The fraud was detected when the intended parents tried to register the birth, on returning from Italy. The Court of Cassation decided that the child born abroad through surrogacy could not remain with the "intended parents" but had to be adopted by another family' (13 November 2014, available at: <<http://genethique.org/en/surrogacy-italy-does-not-recognise-intended-parents-62474.html>>).

540 Law no. 14/2006 of 26 May 2006, which came into force on 28 May 2006.

541 See, e.g., France and Switzerland discussed in this chapter. See also the comparative table at 3.12.

husband will be presumed to be the other legal parent, although there may be (and there often is) scope for a genetic intending father (but not, it would appear, as yet in France) to challenge this presumption of paternity. If the surrogate is unmarried or not in a registered partnership (or equivalent), the genetic intending father can usually acknowledge or determine his parenthood.

While surrogacy may be prohibited, solutions are found to ensure that the child is not left in a legal limbo and stateless. This is the case in Switzerland by the application of step-parent adoption rules for in the case of (opposite sex) married couples or in Belgium or Austria by reference to the child's best interests requiring the establishment of parentage in favour of the intending parents. To this list of jurisdictions, Spain⁵⁴² has also encountered the effects of surrogacy despite a legislative prohibition. A surrogate mother in California gave birth to twins.⁵⁴³ The Spanish resident same-sex couple asked the Spanish Consulate in California to register the birth in San Diego of the twin boys, who, according to the certificate of the Californian register of births, were the sons of both men. The Spanish Consular Register found that the children had been born to a surrogate mother, and as a result, the surrogate was the legal mother of the twins in Spain. This conclusion meant that the registration request would be denied based on the application of Article 10 Law 14/2006.⁵⁴⁴ A request for a visa to permit the twins to travel to and enter Spain was also denied. The intending parents made an application for review of that decision before the *Dirección General de los Registros y el Notariado* (DGRN).⁵⁴⁵ The DGRN applied a procedure for recognition of the Californian birth certificates. At this stage, the position of the DGRN was that this involved a '*request for registration in Spain of a birth certificate from a foreign authority that arouses questions of recognition and not of conflicts of law.*'⁵⁴⁶ However, on

542 In Spain, Article 10(1) of the Law on Assisted Human Reproduction Techniques maintains the prohibition on surrogacy, which has been established by law since 22 November 1988. See Ley 14/2006, of 26 May, sobre técnicas de reproducción humana asistida, BOE n. 126, 27 May 2006 available at: <www.urecentrogutemberg.es/en/legislacion-reproduccion-asistida.htm>.

543 DGRN 2575/2008, 18 February 2009 (Spain) reported at: <<http://conflictoflaws.net/2010/surrogate-motherhood-and-spanish-homosexual-couple-iii/>>.

544 M. Isidro Requejo, 'Spanish Homosexual Couple and Surrogate Pregnancy' available at: <<http://conflictoflaws.net/2008/spanish-homosexual-couple-and-surrogate-pregnancy>>.

545 The DGRN is not a judicial entity but an administrative one depending on the Ministry of Justice. The decision of the DGRN can be contested and taken before the courts. But the DGRN is the supreme entity governing registries and gives instructions (directives) to ensure the correct functioning of the registries (certificates, registrations).

546 Article 81 Reglamento del Registro Civil was applied. According to this article, facts can be registered by means of Spanish public documents; public foreign deeds are also accepted, provided they are given force in Spain under the laws or international treaties. A foreign deed has to meet three conditions in order to be suitable for registration in Spain: (i) it must be a public one: it has to stem from a public authority and meet the necessary requirements to be considered 'full evidence' (i.e., to display privileged evidentiary strength) when used before the courts of the country of origin. Apostille or legalisation is usually called for; so does translation; (ii) the public authority granting the document has to be equivalent to the Spanish ones; (iii) the act contained in the foreign registration certificate must endorse a legality test involving three elements:

20 September 2010, the *Tribunal de Primera Instancia* (Court of First Instance) at the request of the Public Prosecutor declared null the transposition of the birth certificates. The Court refused to recognise the foreign birth certificates on the ground that they were contrary to the law of parenthood in Spain, which establishes the legal parenthood at birth (to the birth mother). The intending parents appealed. The DGRN ordered the transcription of the twins in the civil registry, arguing that the question of parentage was not the object of the procedure but to attend to the issue of recognising the validity of the proof of the certificates issued by the foreign registry office.⁵⁴⁷ As a result, the twins were considered to be the children of the Spanish same-sex male couple with the associated transcription made in the family record booklet.⁵⁴⁸ For the DGRN in 2009, the best interests of the child, considered as a supranational norm established by Article 3 CRC, and the need to guarantee a single identity for children across national borders were paramount.

In order to protect the best interests of children and the interests of surrogates, the DGRN issued an Instruction on 5 October 2010⁵⁴⁹ on the regulation of registration (and, importantly, not expressly on the determination of parenthood) in cases of surrogacy.⁵⁵⁰ According to the Instruction, reversing the DGRN's previous position, the production before the Spanish civil register of a judicial decision of the competent court of the country in which the child was born is required in order to register the births. The decision of the foreign court must determine the affiliation of the child. The following requirements must be met: (a) the formal validity of the foreign decision, (b) that the original court had based its international jurisdiction on conditions equivalent to those provided by Spanish law, (c) the due process is respected, (d) that the interests of the child and the surrogate mother are guaranteed, and (e) that the foreign decision is a final decision and that the consents given are irrevocable.

In its resolution of 23 September 2011, the DGRN had cause to review these requirements in the matter of children born in India through surrogacy. Here, the DGRN refused the registration of parenthood on the basis that the conditions required by the Instruction of the DGRN were not complied with (specifically, the judgment issued in Mumbai neither guaranteed the respect of the best interests of the child nor the consent of the surrogate).

international jurisdiction of the foreign authority, due process, and compatibility with the Spanish *ordre public*.

547 Article 81 of the Decree of the 14 November 1958 concerning the Regulation of the law on the Spanish Civil Registry.

548 Resolution of the Directorate General for Registers and Notaries (RDRGN) 167 of the 18/2/2009 (RJ/2009\1735)168: assessing the action undertaken against the legal decision of the officer in charge of the Consular Registry, and ordering the transcription into the Spanish Civil Registry of the contents of the foreign birth certificates of the twins born through surrogacy in California.

549 Directive of 5 October 2010, by the Directorate General of Registers and Notaries (BOE no 243, of 7 October 2010) available at: <www.boe.es/diario_boe/txt.php?id=BOE-A-2010-15317>.

550 See M. Requejo Isidro, 'Another Twist in Surrogacy Motherhood Saga', 7 October 2010, available at: <<http://conflictoflaws.net/2010/another-twist-in-surrogacy-motherhood-saga/>>.

As a result, it is seemingly possible that a foreign birth through surrogacy could be entered in the Spanish civil status register if the surrogacy takes a foreign country where the parental relationship is settled by judgment and if certain guarantees are met.⁵⁵¹

The position adopted by the DGRN has created legal uncertainty and has been challenged by the Provincial Supreme Court of Valencia in its judgment of 8621/2011 of the Court (Sentence of the Provincial Supreme Court of Valencia, 23 November 2011) as well as by commentators.⁵⁵² Arguably, the position adopted presents a disjointed approach favouring those intending parents with economic resources to engage in surrogacy in a forum where parenthood is established by judicial decision at the expense of domestic law. Partial recognition would ensure that a child had some nexus with the intending parents. Indeed, DGRN in its Instruction took the position that the non-recognition of any link would undermine the child's best interests.⁵⁵³

In some cases, diplomatic solutions have been negotiated between states, including either inter-country adoption solutions⁵⁵⁴ or the issuing of a travel visa to enable the child to travel the home state of the intending parents.⁵⁵⁵ However, this has often taken considerable time to negotiate (in one particular case, the children and their father were stranded in India for more than two years⁵⁵⁶), and in some cases, the child's status has been unclear upon return.⁵⁵⁷

In other cases, immigration procedures have been adjusted to enable a child to enter the home state of the intending parents 'outside the rules' but only once certain conditions were satisfied. These conditions have included the immigration officer being satisfied that it is likely that the intending parents will be able to obtain a court order confirming their legal parentage on return to the jurisdiction.⁵⁵⁸ In other cases, legal proceedings have been brought in the home state of the intending parents to appeal the refusal issue a the passport

551 It is understood that gay couples have complained to the Spanish Government because the sex of the intended parents results in different treatment. The entry in the Spanish civil status registers for births in foreign countries of children born from a surrogate mother is granted when the intended parents are a man and a woman of procreative age. In this situation, there is no reason for the register authority to suspect that surrogacy is involved, and there is no opposition to the registration. However, when the intended parents are two men, surrogacy is likely to be suspected and the registration is denied.

552 P. Orejudo, 'Recognition in Spain of Parentage Created by Surrogate Motherhood' [2010] 12 Yearbook of Private International Law 624; C. Lasarte Álvarez, 'La reproducción asistida y la prohibición legal de maternidad subrogada admitida de hecho por vía reglamentaria' [2012] Journal La Ley no 7777, 1.

553 P. Orejudo, 'Recognition in Spain of Parentage Created by Surrogate Motherhood' [2010] 12 Yearbook of Private International Law 624.

554 This appears to be the solution which was adopted in the *Jan Balaz* Case. However, the view of the Special Commission meeting on the practical operation of the 1993 Hague Convention on Inter-country Adoption that use of that Convention in these cases is inappropriate.

555 For example, in the case of *Baby Manji* (Supreme Court of India, decision dated 29 September 2008, file no. 2008 INSC 1656).

556 *The Jan Balaz Case*.

557 *The Baby Manji Case*.

558 This was the situation in *Re K (Minors) (Foreign Surrogacy)* [2010] EWHC 1180.

to the child.⁵⁵⁹ An important finding is that there is no reported case across the research jurisdictions in which a child was prevented indefinitely from entering the home state of the intending parents.⁵⁶⁰ While these responses are understandable (as decision-makers try to 'find' a parent in order to avoid outcomes such as leaving children stateless orphans abroad), they also fly in the face of legislative wording.

The comparative review has also demonstrated that certain (albeit a minority) states have maintained their prohibitionist policy in certain circumstances. While France has emerged as a clear anti-surrogacy jurisdiction, the application of national law in cases of surrogacy and the anticipated implementation of the judgments of the European Court of Human Rights in *Mennesson* and *Labassee* lead to the conclusion that the French prohibitionist policy is no longer to be considered absolute. Nevertheless, there are other examples of states (e.g., Switzerland) maintaining public policy prohibitions and statutory requirements in the context of surrogacy.

In a case heard by the Canadian Court of Québec,⁵⁶¹ the intending mother (a married mother of two children) tried IVF and other assisted human reproductive techniques without success. Wanting a third child, the intending mother and her husband turned to surrogacy. They found a surrogate on the internet, met with her, and came to a verbal agreement. The surrogate, a mother of five children with experience in surrogacy, agreed to receive CAD \$20,000 (approximately EUR 14,000) as payment to act as a surrogate. Shortly after the meeting, she was artificially inseminated with the sperm of the intending father. The child was born, and the intending father was registered as the father of the child. No mother was declared on the child's birth certificate.⁵⁶² The intending mother sought to be legally recognised as the mother of the child. The Court considered that the conditions prescribed by law in the context of adoption extended far beyond formal, procedural respect for the consent to adoption given by the father.⁵⁶³ Judge Dubois held that '*[u]nless one chooses to put on blinders, it is not possible to isolate the question over the validity of the consent [to the adoption] with the preceding steps concocted during the execution of the parental project by this couple.*'⁵⁶⁴ Judge Dubois went further:

559 See, e.g., the Dutch case, LJN: BP0426, *Voorzieningenrechter Rechtbank Haarlem*, AWB 10/6420 (10 January 2011); see also the sub-chapters on France and the Netherlands.

560 In a couple of cases, intended parents and children had to stay longer than a year abroad but could then eventually return home. The most famous example here is the case of *Baby Manji*.

561 Judgment of the Canadian Court of Québec as of 6 January 2009, No 450-43-001005-088 available at: <www.canlii.org/fr/qc/qccq/doc/2009/2009qccq628/2009qccq628.html>. Note that Article 541 of the Civil Code of Québec declares surrogacy agreements 'absolutely null'.

562 *Ibid.*, paras. 2-36 (facts). The Québec Court '[n]oting the absence of a maternal filiation on the document, the Registrar of Marital Status could have proceeded with an investigation (Article 109 C.C.Q.), but the evidence is mute in this regard.'

563 *Ibid.*, para. 55.

564 *Ibid.*, para. 57.

[61] Must one, in the name of a so-called 'right to a child', [18] endorse the abuse of the institution of adoption?

[62] In the particular factual context of this case, it must be concluded that, from the very start, the parental project devised by the applicant and the father of the child inevitably involved the deliberate creation of a situation in which, in order to satisfy their desire for a child, the genetic mother would first abandon her baby and then the father would consent to its adoption (Exhibit R-2). [...]

[64] It is clear that the applicant sets great store in the *de facto* situation. Since the child has already been born, the cardinal principle of the best interests of the flesh and blood child should not only move the Court but should be the only criterion for determining the decision to be rendered.

[65] The applicant hopes that the Court will go along with her notion of a 'right to a child' whose interests, once born, are no longer in any doubt, since she is already taking care of it and wishes to continue to do so.

[66] Thus, all the steps conceived and carried out illegally would finally lead to a legal result, thanks to the convenient use of the all-purpose criterion of the best interests of the child. This criterion would clean whiter than white, erasing everything that has been done before.⁵⁶⁵

Judge Dubois concluded that the child does not have a right to maternal filiation at any cost. Under the circumstances, allowing the intending mother of the child's genetic father to adopt the child would be evidence of wilful blindness and would confirm that the ends justify the means. That being so, the intending mother's application for adoption as a second parent was denied.⁵⁶⁶

The trends in these jurisdictions are that (i) there are no reported sanctions despite cases being considered by national authorities; (ii) citizens are travelling elsewhere to participate in surrogacy arrangements (particularly to India, Ukraine, and California); (iii) the parental status of the intending mother (or second parent) is particularly precarious and often not resolved while the position of the (genetic) intending father is usually determined; and (iv) in most states, it is a criminal offence to act as an intermediary in a surrogacy arrangements and/or medically to facilitate surrogacy arrangements (altruistic or commercial).

⁵⁶⁵ *Ibid.*, as stated.

⁵⁶⁶ The contours of public policy are considered below.

3.13.2 *Jurisdictions where surrogacy is largely unregulated: neutral stance*

In the second group of states, surrogacy arrangements remain unregulated in domestic law (neither expressly permitted nor prohibited) although, in most (but not all) of these states, it appears that general provisions of law are likely to be infringed in cases of commercial surrogacy arrangements. In some of these states, altruistic surrogacy is permitted.

General rules of parentage apply to the surrogate-born children. Jurisdictions which have taken this approach include Belgium and the Netherlands as well as Cyprus, Estonia, Finland, Ireland, Latvia, Luxemburg, Malta, Portugal, Romania, Spain, and Slovakia.⁵⁶⁷

An important finding for these jurisdictions is that the national approach rarely leads to clear answers. As considered in the context of the Netherlands, the application of Dutch PIL on parentage provides no definitive and clear answers with respect to the recognition of a foreign authentic act as compared with a foreign judgment on parenthood. Accordingly, the position of the child at birth is often legally unclear.

Faced with surrogate-born children, courts have sometimes considered that the welfare of the children trumped a restrictive position and/or public policy. Yet rather than *de facto* consigning children to become wards of the state or 'stripping' them of parental relations often established in their state of birth, courts and policy makers have chosen to provide at least some form of recognition or establishment of parenthood than might otherwise have been considered prohibited. There is a common trend: gradual recognition of the parenthood of the intending parents of a child born by purportedly non-commercial surrogacy (e.g., Belgium, the Netherlands, and Austria).

The lack of express judicial attention given in the reported cases to the issues of payment and the consent of the surrogacy emerges as a source of concern. The fact that surrogacy has not been explicitly prohibited in Belgium or the Netherlands, either by law expressly or by case law, has resulted in the development of the practice within national borders. Therefore, in the Netherlands, a specific code of good professional practice regulates altruistic surrogacy involving IVF. Judges in both countries are, on the whole, concerned with the child's best interests. They are willing to adapt existing legal regulations in order to grant parenthood of the child to the intending parents. But not all courts have agreed. For example, it has been seen in the Netherlands, for example, that adoption should not be permitted if the prospective adoptive parents took part in a procurement which is unlawful or contrary to public policy (which may well be the case in the case of inter-country surrogacy).

Despite the use of partial remedies by certain states, the current situation is undesirable for the state, all parties to the arrangement, and most importantly for the child(ren). In

⁵⁶⁷ Replies by the contracting states to the questionnaire on the access to medically assisted procreation (MAP) and on the right to know about their origin for children born after MAP. Council of Europe Steering Committee on Bioethics CDBI/INF (2005) 7, 32-35.

some states, such remedies (even partial) are simply not available.⁵⁶⁸ Even those states, which have provided partial remedies, have not been able to do so for all cases. The factual circumstances of these arrangements vary significantly, and the remedies are more of an *ad hoc* and usually limited to the particular case at hand.⁵⁶⁹ This leads to complex, lengthy, and costly proceedings, which often mean that the surrogate-born child (perhaps also the intending parents, immigration status permitting) is forced to stay in the state of birth for an extended period. Legal uncertainty as to parentage can only be a disadvantage to a child. In all cases, at stake is the legal parenthood of children who may end up parentless and (potentially) stateless.⁵⁷⁰

The trends in these jurisdictions are that (i) citizens are travelling elsewhere to participate in surrogacy arrangements (particularly, as noted from the reported cases, to India, Ukraine, and California); (ii) the parental status of the both intending parents can usually be established, often by way of step-parent adoption (albeit this may not be so if the intending parents do not satisfy the conditions, e.g., are unmarried or are in a homosexual relationship); and (iv) regulatory frameworks have been proposed even if not (yet) enacted.

3.13.3 *Jurisdictions which are pro-surrogacy: Express permission and regulation*

In the states in which there is some form of regulation of surrogacy, this regulation tends to fall into one of two broad approaches: (1) in a minority of states, pre-approval of a surrogacy arrangement is required, for example, in California and also in Greece, or (2) in a number of states, the legislation focuses less on the arrangement *per se* and more on the status of the child and the intending parents once the child is born, such as in the UK. In the latter category of states, while ‘pre-approval’ is not required, domestic legislation con-

568 *E.g.*, in Australia, in a series of cases, while ‘parental responsibility’ orders have been granted to intended parents to grant them the ability to make day-to-day decisions concerning the child, their legal parentage has been refused recognition and has not been established under Australian law: see *Dudley and Chedi* (2011) FamCA 502, *Hubert and Juntasa* (2011) FamCA 504, *Findlay and Punyawong* (2011) FamCA 503, *Johnson and Anor & Chompunut* (2011) FamCA 505.

569 See J. Verhellen, ‘Inter-Country Surrogacy: a Comment on Recent Belgian Cases’ [2011] *Nederland’s International Privaatrecht* at 1.2, where the ‘[f]ait accompli leading to a case-by-case approach by the Belgian authorities’ is described. Concerning the variety of factual matrices which come before state authorities, see: ‘Documenting US Citizenship and Getting a US Passport for Children Born Abroad to US citizen Parents Through ART’ by L. Vogel, US Department of State, presented to the ABA Family Law Section Conference, October 2011, where it was stated, ‘[t]he Department has seen examples of intending US parents who have used ART to conceive children using almost every combination of US eggs and sperm or foreign eggs and sperm and foreign or US surrogates. US intending parents have been single men, single women, married heterosexual couples, and same sex couples, both married and unmarried.’

570 See C. Rotman, ‘Gestation pour autrui: les enfants fantomes de la Republique’, *La Libération*, 20 May 2009, available at: <www.liberation.fr/societe/0101568271-gestation-pour-autrui-les-enfants-fantomes-de-la-republique>.

tains conditions which concern pre-conception matters, even though compliance with the criteria must only be evidenced *ex post facto* to obtain the transfer of legal parentage.⁵⁷¹ The nature and number of these pre-conception criteria vary across states.⁵⁷²

In addition to the positions in the UK and California, Greece offers an interesting comparative framework. In Greece, a pre-birth court order is to be granted that approves the gestational surrogacy.⁵⁷³ The result is that the presumed mother is not the woman giving birth but the woman who obtained court permission, regardless of her genetic connection with the child. Prior to issuing the order, the court must be satisfied that the following conditions exist: (i) a written surrogacy agreement, (ii) no financial benefits (it is unclear what this means in practice), (iii) medical reasons for the surrogacy, and (iv) both parties to the agreement must be permanent residents of Greece. The outcome concerning the birth certificate of the child is that the name of the intending mother appears but not the name of the woman that has given birth and the intending other is the legal mother of the child at birth.

In the transfer of parentage jurisdictions (e.g., the UK), the English court will consider the surrogacy arrangement retrospectively to determine whether or not there has been compliance with domestic law. The agreement is not enforceable other than for the surrogate to be recompensed for her reasonable expenses. The surrogate is the mother according to ordinary rules of legal parentage at birth, and there are set procedures enable a transfer of parentage after birth. The law in the UK provides for the transfer of legal parenthood to the intending parents by means of a parental order conditional, as we have seen, to the fulfilment of several requirements: (i) the intending parents must be over 18 years and married, in a civil partnership, or living together and at least one of them must be domiciled in a part of the UK; (ii) a genetic link must exist between at least one of the couple; (iii) the child must live with the couple (after being handed over to them), which means that the surrogate mother consents with the parental order to be made; (iv) no remuneration may be paid (other than reasonable costs); and (v) the application for a parental order must be lodged within six months of the child being born.

In some jurisdictions, purportedly altruistic surrogacy is available only for eligible people (couples versus individuals). Most Australian jurisdictions fall into this category,

571 See the observations of the HCCH Study 2014 at para. 23.

572 E.g., in many states, there is a requirement for a genetic link between one of the intending parents and the child in order for a transfer of legal parentage to be obtained: e.g., Australia, Canada (Alberta), Israel (sperm must always be that of intending father), New Zealand. In some of these states, this, along with limited relationship status and age criteria for the parties, may be the only pre-conception criteria which must be fulfilled in order to obtain a transfer of legal parentage. In other states, however, the pre-conception conditions are far more stringent and the parties must establish *ex post facto* e.g., Australia (TAS).

573 K. Rokas, 'National Report on Greece' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 9.

as do Alberta and British Columbia in Canada, Greece, Israel, South Africa, the UK, and New Zealand. Specific provisions for legal parentage are, in most states, made available.

There are usually criminal provisions for commercial surrogacy activities. 'Altruistic' surrogate mothers are usually entitled to recover reasonable expenses arising from their surrogacy activities. Under UK law, the current system for controlling the level of payments made to surrogates is seemingly ineffective because the only sanction is the denial of a parental order after a child has already been born, and the effect of denying a parental order is to punish a child for the actions of his or her parents. Moreover, it is also worrying that the current UK law may prevent an intending parent securing his or her position if he or she were unexpectedly widowed or if the intending parents separated during a surrogate pregnancy and before a parental order was issued.

The final and more restricted category of jurisdiction is where commercial surrogacy is permitted and practised. In addition to those states where commercial surrogacy is allowed by statute (e.g., California and the Ukraine) or judicial precedent, there are also states where commercial surrogacy is practised on an unregulated basis (e.g., India). Jurisdictions falling within this category include 18 states of the USA (including California), certain states of Mexico (including Tabasco), India, Uganda,⁵⁷⁴ Russia, Ukraine, Georgia, and Moldova.⁵⁷⁵

There are two principle reasons for the permissive approach to commercial surrogacy. First, there are usually procedures in place within these jurisdictions to enable legal parentage to be granted to an intending parent either before birth (e.g., California) or after birth. Second, in some countries, there is an economic policy encouraging surrogacy (e.g., India and California). This means that commercial surrogacy is performed on a relatively large scale and that there is often no nationality or habitual residence (or other) requirement for the intending parents.

In those states that have adopted frameworks to respond to surrogacy arrangements, a number of similarities can be observed. The first is that a parental order or judgment will usually be possible in situations where the surrogacy agreement is made between the surrogate and the intending parent or parents before conception occurs. It follows that the pregnancy must have come about as a result of the surrogacy-related treatment. Second, at least one intending parent must be genetically connected to the child (although not necessarily in California). The existence of the genetic link must first be proven through a DNA test. Third, the surrogate-born child is placed in the care of the intending parent(s) immediately after birth. As to the process, some jurisdictions share the requirement that a court order is required to confirm the legal parental status of the intending parents (e.g., California).

⁵⁷⁴ Comments by B. Isoto, 'National Report on Surrogacy: Uganda' (unpublished) at Aberdeen Workshop.

⁵⁷⁵ See the findings of HCCH Study 2014.

As to national oversight of the arrangements, while the UK model stipulates the requirements for parental orders, there is little, if any, active interference by the state until such time as a parental order application is made. In the Californian model, however, the state intervenes in the process from the outset inasmuch as all agreements must conform to the legal requirements set out in Californian law and as part of the application for a pre-birth parental judgment.

In the jurisdictions where commercial surrogacy is permitted (or unregulated), it is also possible (and sometimes mandatory) to use anonymous donors of genetic material (eggs and sperm). For the surrogate-born child, the identity of surrogates (and egg or sperm donors) may therefore be unknown and/or difficult to trace; they may not be named on the birth certificate (as is the case in California and India). Even if the requirements of the state of birth do not allow the names of the intending parents to be placed on the birth certificate immediately upon the birth of the child, the intending parent(s) will usually seek a court order permitting the amendment of the birth certificate to reflect this fact following, for example, an acknowledgement of paternity by the intending father or adoption by the intending mother or by both intending parents (in particular, where neither of the intending parents is genetically related to the child). It is likely that the current practices in these jurisdictions may mean that many individuals born from inter-country surrogacy arrangements will be unable in the future to obtain information about either the surrogate or any donors of gametes. In this regard, the situation has been viewed as similar to adoptees and donor-conceived individuals who were/have been denied access to information about their genetic or gestational origins. It should be noted that the UK has addressed the issue by retaining a record of the birth circumstances and India's Assisted Reproductive Technology (Regulation) Bill 2010 (which is yet to be passed) grants a surrogate-born child limited rights to non-identifying information when they turn 18.

Where the intending parents do not meet the statutory requirements for application for a parental order, alternative solutions have to be resorted to. In particular, the intending parents might need to apply for adoption, special guardianship, or a child arrangements order. In the UK, although an adoption order produces the same effects as a parental order, a successful application of adoption legislation to surrogacy cases in the UK (in particular cases involving commercial surrogacy) is uncertain and it should be noted that parentage following an adoption is established as from the date of the adoption order and not from the date of birth.

3.14 DETERMINING THE BASIS FOR LEGAL PARENTAGE FOLLOWING SURROGACY ARRANGEMENTS

In Part One, to the extent that coherent positions are identifiable, the different means to establish legal parentage in the context of surrogacy as well as the positions (legislative, policy) adopted with respect to surrogacy in each of the research jurisdictions have been considered.⁵⁷⁶ From the review, it can be observed that in a small number of research jurisdictions, the grounds for legal parentage in the context of surrogacy are stated explicitly in codified sources (such as in the UK or in California), but in most jurisdictions, the grounds have to be derived from the general provisions on legal parenthood (as in France, Austria, Switzerland, Belgium, and the Netherlands). Notwithstanding the absence of specific provisions on parenthood in the context of surrogacy, in most of the research jurisdictions, it seems clear that the (often unwritten) presumption of maternity (*mater semper certa est* rule) and the existing parenthood provisions are applicable for determining legal parentage at the time of the child's birth. It can also be concluded that if the intending parents wish to have a status of legal parentage in the birth state recognised in the state in which the child will live, they often have to commence a process *de novo* in their home state.

The more common approaches to the determination of legal parenthood are the gestational test (i.e., the birth test), the genetics test, the intent test, and the best interests of the child test.⁵⁷⁷ These tests are clearly of relevance in the context of surrogacy. According to the birth test, the woman who gives birth to a child is the legal mother of the child, even if she is genetically unrelated to the child.⁵⁷⁸ In accordance with the genetics test, the child's legal parents are determined on the basis of genetics. Where the intent test is applied, the intent of the parties (perhaps as expressed in the surrogacy agreement) may influence the determination of legal parenthood.⁵⁷⁹ Lastly, according to the best interests of the child test, the determination of legal parenthood is guided by the welfare of the child.⁵⁸⁰ The

576 For an exhaustive study on the means of establishing legal parenthood, see K. Saarloos, 'European Private International Law on Legal Parentage? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition in Legal Parentage' (Dissertation, Maastricht University 2010). Saarloos considers four different methods to establish legal parentage in the jurisdictions he researches, namely automatically, by means of an administrative action, by apparent status and by judicial establishment.

577 Y. Margalit, O. Adam Levy and J. Loike, 'The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood' [2014] 37 Harvard Journal of Law and Gender 107: 'In addressing these questions, scholars and the courts have viewed legal parenthood in the context of ARTs in terms of five paradigms – genetics, intent, gestation, the marital presumption, and functionalism. Underlying these paradigms is the recognition that parenthood is not a monolithic concept.'

578 See, e.g., the UK HFEA 2008, section 33(1).

579 See, e.g., *Johnson v. Calvert*, 5 Cal 4th 84, 19 Cal Rptr 2d 494, 851 P 2d 776 (Cal 1993).

580 See, e.g., P. Laufer-Ukeles, 'Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis' [2002] 9 Duke Journal of Gender Law and Policy 91; C. Spivack, 'The Law of Surrogate Motherhood in the United States' [2010] 58 American Journal of Comparative Law 97, 101-09; C. Kindregan, 'Considering

determination of legal parenthood may lead to the conclusion that a person may genetically be a parent of the child but not a parent as a matter of law and a person may not be genetically a parent of the child but may be a parent of the child for some purposes at law.

It has emerged that the current PIL rules in the field of parentage have not been designed to deal with the complex issues that present themselves in surrogacy cases. There have been cases (e.g., in the Netherlands and Belgium) where parentage has not been established in favour of both intending parents usually because a public policy exception (with an emphasis on the *mater semper certa est* principle) to the recognition rule has been applied. Some states have applied partial remedies to facilitate recognition of the genetically related intending father, on the basis that the illicit nature of the surrogacy arrangements under internal law could not be given greater weight than the best interests of the child. The other intending parent's status (even if a genetically related mother) is much more precarious, primarily because the surrogate will usually be considered to be a parent. As discussed further below, the civil status rules result in the unequal treatment of intending mothers or co-parents when compared to intending fathers. This unequal treatment is evident both at the time of the child's birth and where it concerns the nature of any transfer of parentage or adoption required following surrogacy.

Lastly, what then of the surrogacy agreement? It is common ground among each of the research states that in cases of surrogacy, to the extent that it is permitted, the transfer of parentage (as a status) is not based on the agreement between the parties but rather on a state act (e.g., after state examination as part of the pre- or post-birth parental or adoption order). The legal rules on filiation are imperative, as part of one's status, and transfers of parenthood are outside the scope of contractual freedom yet the judicial approach towards the consequences of informal surrogacy agreements, in systems where surrogacy is not explicitly regulated or even explicitly forbidden, is quite different. The link to public policy, for example, is very clear in each of the European states. While there is some room for the influence of private autonomy in the law of parenthood, there are necessary limits⁵⁸¹ and it appears that the type of contractual agreements as known in the law of obligations does not serve as an accepted model.⁵⁸²

Mom: Maternity and the Model Act Governing Assisted Reproductive Technology' [2009] 17 Journal of Gender, Social Policy and the Law 611-14, analysing the 'birth mother test' and the 'genetic connection test for maternity' in surrogacy cases in the US context; D. Wald, 'The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage' [2006-2007] 15 Journal of Gender, Social Policy and the Law 379; E. Hisano, 'Gestational Surrogacy Maternity Disputes: Refocusing on the Child' [2011] 15 Lewis and Clark Law Review 517, 543-52; and B. Lewis, 'Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes' [2010-2011] 49 University of Louisville Law Review 371.

581 Limits include the best interests of the child that the child or surrogate must not become an object of disposition.

582 This is not to deny that, for example, in California, intentional parenthood, determined by contract law or by notions of de facto and social parentage, has been increasingly advocated in academic literature as the appropriate way to determine parentage in the context of ARTs.

The analysis now turns to consider the parental status of the various parties.

3.14.1 *The legal mother*

In the vast majority of states, the woman who gives birth to a child is the legal mother of the child by operation of law at birth. This position results from legislation in some states, and in others, it is deemed simply an established practice or the position at common law, that is by virtue of the *mater semper certa est* principle. This is so in Austria, Belgium, the Netherlands, Switzerland, UK, and Germany, among others, but most notably not in France, California, or India.⁵⁸³ In some states of the civil law tradition, albeit a minority, a subtly different approach is adopted. As discussed in the context of France, for example, maternity is established by, for example, acknowledgement of the child.

To ensure that there is one legal parent at birth, some legal systems provide legal certainty that at least the birth mother is to be considered the legal mother – and no other woman – even if she is not genetically related to the child. This is the position taken, for example, in the UK and in Germany.⁵⁸⁴ The German law on parentage has been amended specifically in view of the complications arising from medically assisted reproduction techniques. Section 23 § 1591 German Civil Code addresses those situations where, despite both being prohibited, surrogate motherhood or eggs donation occurs and it does so by establishing that the parturient – and no other woman – is the legal mother for all purposes.⁵⁸⁵

Apart from its historical origins, there are at least two reasons to justify the establishment of motherhood based on birth. First, this is a clear and direct solution; it is not usually dependent on further analysis, such as a genetic test and, as such, creates legal certainty. This is particularly important at the time of a child's birth. Second, the birth mother is the one who, during pregnancy and at birth, has established a physical, biological, and psychological relationship with the child. The principles of biological affiliation and legal certainty justify the legal consensus on the attribution of motherhood.

There is also a presumption in a small minority of states that second motherhood (such as in the Netherlands), second female parenthood (England and Wales), or co-motherhood (Belgium) also applies to the female spouse or female registered partner of the mother. In

583 The same applies in Greece. Surrogacy is regulated by Article 1458 of the Greek Civil Code introduced by Article 8 of Law 3089/2002.

584 A child's mother is without exception deemed to be the woman who gave birth to that child, no act of acknowledgement or registration being necessary (Section 1591 BGB). The same applies in the case of surrogate motherhood, which is prohibited in Germany.

585 See for a detailed consideration of this suggestion, D. Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' [2011] American Journal of Comparative Law.

these cases, the foundation of motherhood or parenthood is social and intentional, rather than biological.

It has been seen that if the surrogate is regarded as the legal mother at birth – and she usually is in the home state of most intending parents – then there is usually little scope for the intending mother to establish herself as a legal parent at the birth of the child. Even if the surrogate lawfully relinquishes her status as the legal mother (prior to and/or following the birth) in her state of residence, this will only perhaps be relevant for the later purpose of transferring legal parenthood according to national legislation. This usually means that the intending mother has no legal standing with respect to applying for the child's travel documentation or establishing the child's citizenship status. Crucially, she will not have parental responsibility and cannot, for example, give consent to medical treatment or take a myriad of decisions in relation to the child, which parents routinely do. The intending mother, absent a legal intervention, has no legal status but is very likely to have an emotional and social status and perhaps also a genetic link with the child.⁵⁸⁶

3.14.2 *The legal father*

The grounds for legal paternity at birth are far more complicated than the grounds for legal maternity; a great deal depends on whether the surrogate is married or unmarried (e.g., in the UK, the Netherlands, France, Switzerland, and Belgium). In each of the research legal systems, a man will be presumed to be the legal father of a child (and registered as such) if that child is born during his marriage to the woman who gave birth to the child or within a defined period following its termination, whether by death, dissolution, or annulment (i.e., the *pater is est quem nuptiae demonstrant* principle). In a minority of states, this presumption of legal paternity extends to an unmarried male cohabitant of the birth mother under defined conditions. The rationale for this legal presumption appears to be that it is considered more likely than not that the husband of the birth mother (or, in a minority of states, the male cohabitant) is the genetic father of the child and, from a child welfare perspective, it is better for the child to have a registered father than none.

It can be observed that in the legal systems examined, there are four grounds for legal paternal affiliation: the legal presumption, voluntary acknowledgement or recognition, either before or at the time of the child's birth or subsequently; judicial or administrative decision; and, in more limited cases, apparent status (e.g., in France). Several factors should be considered in attribution of legal fatherhood, including the marital status of the couple,

⁵⁸⁶ M. Vonk, 'One, Two or Three Parents?', [2004] 18 *International Journal for Law, Policy and the Family* 114-116 and her dissertation 'Children and their Parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law' (Intersentia, Antwerp 2007), 229-242.

the consent to application of ART (if relevant), and any specific regulations on donor anonymity.⁵⁸⁷ However, not only do legal systems differ according to whether or not these grounds are used at all in the laws on legal parentage, they also differ as to the situations in which the grounds apply. In most states in which there are such provisions, the husband of a woman (or, in more limited cases, the partner of the woman⁵⁸⁸) who gives birth to a child following ART is usually stated to be the legal father or parent of the child by operation of law, irrespective of genetics but provided that he (or she) consented to the treatment. It can also be concluded that not all legal systems define the eligibility or scope of application of the rules on legal affiliation in case of fertility treatment in the same way.

While the grounds of paternity are more complex, the process of returning to the home state of the intending parents with a child born by way of inter-country surrogacy is likely to be more straightforward (if contrasted with the position of the intending mother or co-parent). This is applicable if (a) the intending father is the genetic father of the child and (b) the surrogate is single/not married. If the intending father's genetic connection can be evidenced, this usually provides a legal basis for the intending father to be regarded as the child's legal parent at birth whether by a process of recognition or acknowledgement of the child or by declaration of a paternal status.

3.14.3 *The co- or second parent*

The comparative review has demonstrated that the parental legal status of the co-parent or second parent differs considerably across the research legal systems. The figure of co-parent appears more often in the context of same-sex couples (married or in registered unions). Not all states regulate same-sex marriage or *de facto* unions, and not all states treat same- and opposite-sex couples equally in terms of the determination of parenthood. Some states do not provide access to fertility treatment for women in same-sex relationships (e.g., France and Switzerland).

If the intending parents are in a same-sex relationship, parentage of the co-parent cannot be based on genetics and must be based on some factor, such as intention or social factors. It can be assumed that the question of paternity can in principle be resolved for the intending genetic father in a same-sex union, i.e., the male parent who provides his gametes for the conception, in the same way that parentage can be determined for a intending genetic father in a heterosexual union. The second male intending parent, i.e.,

587 The anonymity of sperm donors was abolished in Sweden in 1985; Austria, 1992; Victoria (Can.), 1998; Switzerland, 2001; the Netherlands and Western Australia, 2004; Norway, the UK and New Zealand, 2005; Finland, 2007; see E. Blyth and L. Frith, 'Donor-conceived People's Access to Genetic and Biological History: an Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity' [2009] 23 *International Journal for Law, Policy and the Family* 177.

588 E.g., in the Netherlands.

the prospective male co-parent who has not provided his genetic materials for the conception, is therefore in a similar position *vis-à-vis* parentage as a second female intending parent or a female spouse. This has been demonstrated, for example, in the Netherlands and Switzerland. By contrast, the intending genetic father is in a better position than a female intending mother in the same situation because he has a right to assert his paternity from the time the child is born by virtue of being the genetic father of the child. The position of the female genetic parent who is an egg donor, on the other hand, does not usually meet the traditional standard for legal motherhood, i.e., gestation. Looked at in this way, this approach to parenthood is a position which privileges male genetic parenthood of intending parents (perhaps also sperm donors) and excludes female genetic parents whether they are intending parents or egg donors.

As discussed in the context of legal maternity, the co-parent has no legal standing with respect to applying for the child's travel documentation or establishing their citizenship status and, more broadly, he or she does not have parental responsibility with respect to the child. These comments are not unique to the field of surrogacy and, in many ways, build upon, at a macro-level, similar concerns raised in the context of LGBTI families.⁵⁸⁹

It is therefore necessary to consider what this means from a children's rights perspective and what might be the possible options for establishing legal parentage for the second intending parent in a same-sex union who has no genetic connection to the child.

3.14.4 Conclusion on applicable law in matters concerning parentage

This review shows that the law applicable to the establishment of parent-child relationships is not subject to party choice. This review also shows that (with the exception of the UK) the majority of the research legal systems do not have specific conflict rules on parentage in the context of surrogacy.⁵⁹⁰ Instead, while domestic rules of parentage apply, this has not been proven to be problematic. For many states, if the situation has foreign elements, the usual applicable law rules will apply to determine which law determines the child's legal parentage (or, in some cases, legal paternity only) arising by operation of law. The child's nationality at the time of the child's birth is a common connecting factor for the conflict rule. In the context of surrogacy, however, this connecting factor is uncertainly

⁵⁸⁹ See L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' [2012] *International Journal of Children's Rights*. Hodson comments as follows: 'The consequences of this blind-spot are considerable: it endorses the patchwork of uneven protection for children in LGBT families under national laws. This paper points towards a child-centred approach that would broaden the Court's understanding of family life and more accurately reflect the family lives of children raised in non-traditional families.'

⁵⁹⁰ See also the observations of the Hague Conference in HCCH Study 2014 at Part B.

mindful that the child's nationality may not be determined until such time as parentage is established.

Among the Dutch, Belgian, French, Swiss, Austrian, and English legal systems, the first observation relates to the formal scope of the national conflict rules. Under French, English, and Swiss law, the conflict of law rules on parentage have universal scope which means that they apply irrespective of the residence or the nationality of the persons involved. Under Dutch law, the conflict of law rules have limited formal scope. The choice of law rules only apply to acts and facts concerning parentage that take place in the Netherlands. If acts and facts have taken place abroad, Article 10:100 and 101 DCC apply.

It can be seen that there are two main themes regarding the applicable law rules: (1) there is a division between those states which will consider applying foreign law where a situation has foreign elements and those which will always apply the *lex fori* when called upon to determine a child's legal parentage, and (2) in those states in which foreign law may be applied, nationality remains a primary connecting factor in many states (often the nationality of the child and also that of the intending parents) but this is not uniformly the case and many states also have multiple possible connecting factors and the choice of applicable law will often be premised on serving the best interests of the child. Regarding the connecting factor for legal parentage, the main connecting factor in French law is the nationality of the mother; in Austrian law, the habitual residence of the child; and in Switzerland,⁵⁹¹ Belgium, and the Netherlands, the (common) nationality of the parents. It should be noted that, across the European research jurisdictions, the application of a foreign law designated by these applicable law rules will be subject to a public policy clause or other exceptions.⁵⁹²

With respect to the formulation of the conflict of law rule for parentage, it has also been shown that the use of terms 'father' and 'mother' are not convenient in PIL rules on parentage, whose purpose it is to determine who are the legal parents of the child.

3.14.5 Conclusion on the recognition of legal parentage established abroad

A variety of approaches have been observed in the context of recognition of legal parentage established abroad. This is not particularly surprising as each state has, as a matter of principle, its own discretion to regulate its law on parentage. Broadly speaking, each state has its own discretion with respect to grounds for recognition of parentage and the grounds for non-recognition, such as public policy, fraud, and irreconcilability with an earlier judgment. The diversity of the recognition policies reflects the differing, notably ideologi-

⁵⁹¹ However, in Switzerland, if neither parent is domiciled in the state of the child's habitual residence and the parents and child are nationals of the same state, the law of that state will apply instead.

⁵⁹² See the observations of the HCCH 2014 Study at para. 80.

cally influenced, views that have moulded them. The outcome of this reality, as this review has demonstrated, is that the diversity of recognition policies may result in limping legal relationships and the non-continuity of a personal status established abroad.

From the analysis, it can be observed that a preliminary issue when examining the possible recognition of parentage established abroad relates, in some states (e.g., the Netherlands), to the nature of the document emanating from the foreign state and relied upon as establishing or evidencing legal parentage. Depending upon the circumstances of the case, a variety of different documents may be submitted to the authorities in the state in which recognition is sought and the nature of the document may, in some states, ‘*affect the rules which are applicable to its recognition or whether it can be recognised at all, namely: foreign birth certificates, acknowledgements of legal parentage and judicial decisions.*’⁵⁹³ In relation to foreign judicial judgments, there is far more congruity in states’ approaches with many states adopting the recognition approach, often subject to indirect rules of jurisdiction and certain procedural safeguards.⁵⁹⁴ If the recognition approach is adopted, there is the real risk that the public policy exception may apply to prevent recognition of the legal relationship(s).⁵⁹⁵

Given the multiple references in this context to public policy, how then is public policy to be understood in the context of surrogacy? Or, to put it another way, when is surrogacy against public policy?

3.14.6 *Public policy in the context of inter-country surrogacy*

The comparative review has demonstrated that a plurality of sources is looked at for the purpose of assessing public policy. Domestic law plays an important role in this respect. And to the extent that they reflect the existence of fundamental values and principles of the legal system they belong to, constitutional and infra-constitutional rules governing private relationships are also relevant. Public policy has a European and an international dimension which the courts and national authorities should not neglect.

Since the scope and content of public policy depend on a combination of factors, it is unsurprising that public policy in the context of surrogacy varies from one country to another and within one country from time to time. The public policy exception is familiar to each of the research legal systems. When transposed to cases of inter-country surrogacy, it has therefore opposed the application of a foreign law or the recognition of a foreign judgment.

⁵⁹³ See for a detailed discussion HCCH 2014 Study at para. 84.

⁵⁹⁴ See also the observations of the Hague Conference in HCCH Study 2014 at Part B.

⁵⁹⁵ *Ibid.*

In interpreting and applying a public policy exception, states have to pay close regard to national and international human rights provisions and the circumstances of each individual case *in concreto*. The application of the public policy exception is also complicated by the possible existence or development (in the context of the ECHR) of family life between the intending parents and the child in the state of recognition.

In France, the *Cour de Cassation* faced the question of the applicability of a public policy exception in three cases judged the same day, all involving French intending parents who entered into surrogacy agreements abroad.⁵⁹⁶ All three judgments gave the same reasons:

- i. The foreign (i.e., American) birth certificate could not be transcribed in the French civil status registry. The foundation of the birth certificate was a foreign judgment on parentage, which violated French public policy.
- ii. The fundamental principle of French law is the principle that civil status is inalienable. Pursuant to this principle, the law of parenthood cannot be derogated by contract.⁵⁹⁷
- iii. Non-recognition does not violate Article 8 ECHR, as the children have a father (i.e., the genetic father), have a mother under the law of the relevant US state, and may live together with the intending parents in France.
- iv. This outcome does not violate Article 3(1) CRC or the best interests of the child principle (although no reason is given for this statement).⁵⁹⁸

France is not alone in adopting this reasoning. The Supreme Court of Japan refused, also based on the public policy exception, to recognise a judgment of a Nevada State Court, because the judgment established that the Japanese intending parents as the parents of a surrogate-born child as '*incompatible with the fundamental principle or fundamental philosophy of the rules of law on personal status in Japan*'.⁵⁹⁹ And a similar result has been observed in Switzerland albeit in the context of a same-sex couple.

In 2009, a Dutch court (Rechtbank's-Gravenhage) refused to recognise the legal paternity of a Dutch national that had been established in France, because the mother of the child gave birth anonymously (as permitted under French law).⁶⁰⁰ In 2009, the Court held on two occasions that a foreign birth certificate that does not name the birth mother of the child, while it is known who gave birth to the child, violates Dutch public policy. The first decision concerned a case of a Dutch surrogate and two Dutch men who were the intending parents,⁶⁰¹ all residents in the Netherlands. The surrogate gave birth anyo-

596 Cass. civ. 6 April 2011 – n. 09-17130 and Sénat: Journal Officiel de la République Française no 58 S, 10 June 2011, 4664-4665, also available at: <www.senat.fr/seances/s201106/s20110609/s20110609.pdf>.

597 See Article 16(7) and 16(9) French Civil Code.

598 See Article 16(9) French Civil Code.

599 Supreme Court of Japan 23 March 2007 at 4(3).

600 Rechtbank 's-Gravenhage, 14 September 2009, LJN BK1197.

601 The author is grateful to Kees Saarloos for this reference.

mously in France to make sure that she did not appear on the child's birth certificate. One of the men acknowledged his paternity before the French civil status registrar. The Court held that the French birth certificate violated Dutch public policy. It observed that according to international law (Article 7 CRC), the child has the right to know his or her origins to the extent possible. According to the Court, it is for the child at a later stage to form his or her identity and, to do that, the child must have access to all the information on his or her filiation. That being so, the legal basis establishing the legal maternity of the birth mother is such a fundamental rule of Dutch family law that it expresses Dutch public policy. It would seem that a birth certificate that does not name the surrogate as birth mother, when her identity is known, therefore violates Dutch public policy. It is difficult to see how the recognition could be against public policy in a case where the identity of the surrogate is easily traceable, e.g., in California, by reference to the pre-birth parental judgment. Since the child has access to information regarding his or her status (i.e., as a child conceived through surrogacy), as well as his or her genetic parents (i.e., the intending parents), the fact that the lack of a reference on the birth certificate should lead to non-recognition in all cases seems erroneous.⁶⁰²

In another Dutch case, the *Rechtbank 's-Gravenhage* refused to recognise two men as the legal parents of a child who had been born to a surrogate mother in California. At the moment of birth, the men were also living in the USA. In essence, the Court held that the legal parenthood of both the genetic father and his male spouse could not be recognised because the Californian authorities did not establish the legal maternity of the surrogate mother. The case raises two issues. The first is whether the refusal to recognise the legal parenthood of the two intending fathers is consistent with Dutch policy that legal parenthood of intending parents can be established through acknowledgement of paternity and adoption. The answer to that question is likely to be no. The second issue touches upon the concept of the public policy exception. Does it matter that the intending parents and the surrogate at the moment of the birth of the child lived in the USA? At the moment of the establishment of legal parentage, their only connection with the Netherlands was rather abstract, namely the Dutch nationality of the child's genetic father, when the surrogacy arrangement was concluded and when the children were born the intending parents lived in the USA. Would it be consistent to develop a public policy whereby the recognition of the legal parentage of the intending parents depends on the degree of proximity between the case and the legal order of the recognising state? Here, the intending parents had engaged in a lawful practice in a state where they were lawfully resident. A Belgian court has arrived at an opposite conclusion to that of the Dutch Court.⁶⁰³

⁶⁰² The discussion continues at 4.15.

⁶⁰³ *Nederlandstalige rechtbank van eerste aanleg Brussels 2012/5418/B*.

The American surrogacy arrangement did not, for Belgian law purposes, violate the *mater semper certa est* principle because the surrogate was known and she had given her consent in accordance with a local regulation that cannot be deemed to be contrary to Belgian public policy. The fact that this consent, it seems, preceded the birth of the child and that there is no legislation on surrogacy in Belgium cannot be used as reasons to refuse recognition. Finally, it is noted that it is in the best interests of these children to have filiation established. The Court notes that the effects of both judgments for the Belgian legal order are the same as those of a full adoption by two persons of the same sex.

The Austrian Constitutional Court has also found the surrogacy arrangement not to be, *per se*, a breach of Austrian public policy.⁶⁰⁴ As discussed above, when the intending mother claimed child benefits, the Austrian Ministry of Interior requested the City of Vienna to withdraw the Austrian nationality of the children arguing that surrogacy was illegal under Austrian law, that the surrogate remained the children's mother under Austrian law (irrespective of the genetic relationship), and that the American Court's decision establishing parental rights of the Austrian mother could therefore not be recognised by Austria. The Constitutional Court rejected this argument on four grounds:

- i. It pointed out that the American judgment establishing legal motherhood of the Austrian genetic mother was taken without reference to Austrian law and was valid under norms of Austrian private international law.
- ii. While Austrian law prohibiting surrogacy was part of Austria's public policy, thus overriding the American judgment, the Court outlined that the federal law on Assisted Reproductive Technology had neither constitutional status nor protected fundamental rights. The Court held that while public policy comprises the underlying principles of Austrian law, Constitutional rights are paramount, among them the best interests of the child.
- iii. It was stated that the American surrogate could not be forced into the position of the legal mother against her will by Austrian law. In the words of the Court, '*It would be in contradiction to the child's well-being to impose the child on the surrogate mother,*

604 Austrian Constitutional Court, B13/11-10, judgment handed down on 14 December 2011. The approach of the Supreme Court of Germany decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13) broadly mirrors the approach of the Austrian Constitutional Court albeit in the context of a same-sex couple. The issue in this case was whether two men are the legal parents of a child born through surrogacy in California (with one of the intending father's also being the genetic father of the child). The Supreme Court ordered the child's birth to be registered and both applicants to be registered as the child's legal parents. Citing the judgments of *Mennesson* and *Labassee* (considered in Chapter Four), the Supreme Court found that any consideration of whether a foreign court decision is contrary to German public policy must take into account the human rights guaranteed by the ECHR. A foreign judgment assigning parenthood to a child's intending parents – rather than to the surrogate mother as provided by German law – does not automatically constitute a breach of German public policy if at least one of the intended parents is genetically related to the child. This also applies where the foreign court decision awards parenthood to the registered civil partner of the genetic father of the child, as well as the genetic father himself.

- against her will and her inability of creating a family bond. As a consequence, the child would be excluded from custody, shelter and other inheritance provided by the genetic mother. These far-reaching and negative consequences are not justified in light of the child's well-being.*⁶⁰⁵
- iv. It was held that the Austrian Ministry of Interior had taken the decision to withdraw the Austrian nationality of the children arbitrarily by neglecting scholarly opinion and case law on public policy and by neglecting the welfare of the children as a key concern while determining their nationality.

Any consideration of whether a foreign court judgment is contrary to Austrian public policy must take into account the human rights guaranteed by the ECHR and CRC. A foreign judgment assigning parenthood to a child's intending parents – rather than to the surrogate as provided by Austrian law – does not automatically constitute a breach of Austrian public policy if at least one of the intending parents is genetically related to the child. In terms of the rights of the child, the Court, among other things, relied on the child's right to parental care and upbringing. The child's rights in that context would be violated if a legal status already established abroad were to be abolished. In this respect, the Court also relied on Article 3 CRC, stating that the child's best interests must always be given preference in all decisions concerning the child. The Court further elaborated that the child's right to respect for his or her private and family life under Article 8 ECHR must always be taken into consideration in decisions determining parental status. According to these decisions, the legal relationship between a child and his or her parents forms part of the child's identity which would otherwise be undermined. Article 8 ECHR would also be infringed if the authorities only recognised one of the two intending parents because every child has the right to a legal parent-child relationship with both parents.

In Italy, in what seems to be one of the first reported judgments of this kind, the Court of Appeal of Bari recognised two English parental orders issued in 1998 and 2001 by the Croydon Family Proceedings Court.⁶⁰⁶ The applicants were an Italian woman and an Englishman who, with the aid of a well-known English surrogacy association, entered twice in agreement with the same surrogate mother. After the births of the children, the couple moved to Bari (Italy) and, after some years, divorced, whereupon the woman requested and was granted the recognition of the parental orders. The Court concluded that the fact that surrogacy would be prohibited as a matter of Italian law was not in itself an indicator that it would be against Italian (international) public policy.⁶⁰⁷ The Court applied fundamental rights (Articles 2 and 32 of the Italian Constitution) both to protect

⁶⁰⁵ *Ibid* (13, para. 25 of judgment. Translation into English).

⁶⁰⁶ Corte di Appello di Bari 13 February 2009.

⁶⁰⁷ *Ibid*, 707.

the interests of the child and to protect the interests of the intending parents, respectively. It further explained that, due to the fact that the children had not only lived in Bari with the intending parents since birth as a family unit but established for over ten years a bond with the intending mother and so it was in their best interests for the intending mother to be recognised as their legal parent.⁶⁰⁸

It has also been shown that the English courts have showed themselves to be more concerned to secure the future of a particular child than to maintain strict rules on expenses in assessing how badly the intending parents had offended public policy.

Another mechanism to protect the national order in a smaller number of states (Belgium and France) is the application of the fraud on the law or *fraude à la loi* exception.⁶⁰⁹ For example, the public prosecutor in France or Belgium may have standing to apply for annulment of acknowledgement of legal paternity and maternity if the acknowledgement is in fact a circumvention of, for example, the law on adoption. Or, in the case of surrogacy, the establishment of the legal maternity of the intending woman rather than the birth mother constitutes a *fraude à la loi* in France because Articles 16-7 and 16-9 French Code Civil provide that surrogacy violates French public policy.⁶¹⁰

The review of the legal systems has provided a number of examples illustrating how family law policies *may* cede when faced with a case-specific analysis (e.g., Belgium, Netherlands, the UK, and Austria). Moreover, case law emerging from, for example, the European Court of Human Rights (e.g., *Mennesson*, *Labassee*, *Wagner*⁶¹¹ and *Negrepontis-Giannisis*⁶¹²) shows, in particular, that when a transnational situation arises, Article 8 ECHR requires the contracting states to pursue, *inter alia*, the cross-border continuity of the relevant personal status and family ties; respect for private and family life implies that 'limping' situations – i.e., situations where a personal status is recognised under one state but not in another – should be avoided to the largest possible extent.⁶¹³ This dilemma in the context of surrogacy is reflected in *X and Y (2008)*, where Mr. Justice Hedley commented that this made the process of authorisation of the surrogacy arrangement most uncomfortable:

608 *Ibid*, 708-710, 712 (Note that law n. 40 of 2004 overruled preceding case law by expressly forbidding surrogacy contracts in Italy).

609 M. Niboyet and G. de Geouffre de La Pradelle, *Droit International Privé* (Paris LGDJ 2007) para. 323; W. Tetley, 'Evasion, Fraude à la Loi and Avoidance of the Law' [1994] 39(2) McGill Law Journal 303-332.

610 Circulaire relative à la présentation de l'ordonnance nr. 759-2005 du 4 juillet 2005 portant réforme de la filiation, Bulletin officiel du Ministère de la Justice, 25 October 2006, nr. 103, 109-211 (Nor: Jusc0620513C), 161.

611 *Wagner and JMWL v. Luxembourg*, 28 June 2007 (Application No. 76240/01). Considered in Chapter Four.

612 In *Negrepontis-Giannisis v. Greece*, 3 May 2011 (Application No. 56759/08), a Chamber of the European Court of Human Rights (ECtHR) held that the respondent state, by refusing to recognise an order for adoption entered by a court of Michigan, had violated, *inter alia*, Article 8 ECHR. Considered in Chapter Four.

613 Discussed further in Chapter Four.

What the court is required to do is to *balance two competing and potentially irreconcilably conflicting concepts*. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of the child's welfare.⁶¹⁴ [Emphasis added, MWG]

Courts (and national authorities) are alert to public policy considerations to ensure that surrogacy arrangements are not used to (a) circumvent child protection laws, (b) be involved in anything that looked like the simple payment for effectively buying children, (c) ensure that sums of money that might look modest in themselves were not in fact of such substance that they overbore the will of a surrogate, and (d) undermine the importance and timing of the unconditional and informed consent of the surrogate. In compliance with the approach in the UK, evidence that public policy had not been clearly abused has been drawn in each of the reported cases from facts such as the following: (a) the applicants were genuine, acting in good faith, and without any intention to defraud the authorities; (b) the payments to the surrogate mother were, in the view of the court, not disproportionate; (c) the level of payments could not have overborne the will of the surrogate mother; (d) the UK statute must be 'read down' in such a way as to ensure that the essence of the protected right to family and private life (Article 8 ECHR) is not impaired and that what is being protected are rights that are '*practical and effective*' and not '*theoretical and illusory*.'⁶¹⁵

But other national courts have adopted a contrasting view. The decision by the French Court of Cassation with regard to the *Mennesson* case, for instance, explicitly notes that the best interests test did not require French recognition of the children's filiation, which the Cassation viewed as legalising *ex post-facto* surrogacy practices specifically prohibited by French understandings of the *ordre public international*.⁶¹⁶ But if the alternative is

614 At para. 24.

615 See the discussion in Chapter Four at 4.11.

616 Thus, '[...] attendu qu'est justifié' le refus de transcription d'un acte de naissance établi en exécution d'une décision étrangère, fonde 'sur la contrariété' a' l'ordre public international français de cette décision, lorsque celle-ci comporte des dispositions qui heurtent des principes essentiels du droit français; qu'en l'état du droit positif, il est contraire [...] de faire produire effet, au regard de la filiation, a' une convention portant sur la gestation pour le compte d'autrui, qui, fut-elle licite a' l'étranger, est nulle d'une nullité d'ordre public.' And further: 'qu'une telle annulation, qui ne prive pas les enfants de la filiation maternelle et paternelle que le droit californien leur reconnaît ni ne les empêche de vivre avec les époux X [...] en France, ne porte pas atteinte au droit au respect de la vie privée et familiale de ces enfants [...] non plus qu'à leur intérêt supérieur garanti par l'article 3 § 1 de la Convention internationale des droits de l'enfant.' Arrêt n° 370 du 6 avril 2011 (10-19.053) Cour de cassation – Première chambre civile.

between children becoming wards of the state and children being integrated into a family environment, the best interests principle usually requires the latter choice. But specifically, which family environment, with what parental configuration, and 'living where' will be a fact-specific determination against which courts may choose to validate public policies. As the French Court of Cassation and Swiss Federal Tribunal have vividly demonstrated, at least some judicial authorities will find it possible to reconcile the best interests principle with a prohibitionist treatment of surrogacy.⁶¹⁷ Moreover, despite the obvious tension between policy goals, the inclination to favour the best interests of the child is based on the objective to lessen the detrimental impact of the legal limbo for children born as a result of a cross-border surrogacy arrangement. Given the absence of a regulatory framework in certain jurisdictions (e.g., Belgium and the Netherlands), this line of reasoning is considered reasonable.

The discussion above does not ignore the perceived threat that allowing citizens to avoid domestic law prohibitions by travelling abroad leads to the erosion of that country's domestic law and/or policy. But there is seemingly a paradox that results from the fact that the application of a particular country's PIL rules may indirectly permit an activity that its own domestic laws disallow. This has already been observed, for example, in Austria and Spain. As commented by Muir Watt, if a mere trip will suffice to render party autonomy possible, why not grant individuals outright the legal power to make this choice?⁶¹⁸ Considered in that way, it arguably discriminates against those that do not have the financial means to pay for the travel and the arrangements abroad.⁶¹⁹ Yet, if the refusal to recognise the filiation of the child results in the child being left without parents to take care of the child and/or (potentially) stateless – because the surrogate has no relationship or filiation according to her own law and does not claim such a relationship or even rejects it pursuant to the agreement made with the intending parents – non-recognition requires particular justification.

617 Y. Ergas, 'Thinking 'Through' Human Rights: the Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 27, 427.

618 H. Muir Watt, 'Concurrence d'ordres juridiques et conflits de lois de droit privé', in M. Lagarde, *Vers de nouveaux équilibres entre ordres juridiques: Mélanges en l'honneur d'Hélène Gaudemet-Tallon* (Daloz 2008) 617.

619 Or the treatment, which in cases of assisted reproduction can be very expensive: 'Some people can in effect 'buy their way out' of ethical or moral choices given legislative force in their own Member State. Citizens of the EU are in effect treated differently on the grounds of their ability to pay for privately remunerated reproductive service [...] by its very scope, EC law treats individuals as economic, rather than as social, actors'. See also L. Brilmayer, 'Interstate Pre-emption: the Right to Travel, the Right to Life, and the Right to Die' [1993] 91 Michigan Law Review 873, 878.

3.14.7 *Tensions between genetic and social conceptions of parenthood*

It seems clear that in each of the states, there is no single basis for establishing parentage at the time of a child's birth or subsequently. Rather, there are several bases from which legal parentage can be determined when a child is born. There appears to be three primary bases for this: genetics, gestation, and intention or social basis, although parentage is often grounded on a combination of these factors⁶²⁰ and usually requires an established relationship between the child and the purported parent if parentage is not established at birth. Whereas the assignment of parental status used to be based largely on genetics and relationship status, other factors such as intention and the timing of the consent may also be relevant (e.g., in the UK and the Netherlands, where post-birth consent is required) and may play a role in assigning the status of legal parenthood.⁶²¹

The cases discussed in this chapter highlight the increasing tension between the respective roles of genetics, intention, and social parenting in the attribution of legal parental status and assigning legal responsibilities towards a child.⁶²² Legal parents, for example, are often – but not always – the genetic parents of the child. And while it is usually

620 See for a discussion in the context of surrogacy and AID, K. Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' [2010] 22(4) Child and Family Law Quarterly 449.

621 J. Fortin, *Children's Rights and the Developing Law* (2nd ed. Butterworths 2003) 382.

622 The concepts of legal as opposed to natural parent were also explored in the case of *Re G (Residence: Same Sex Partner)* [2006] UKHL 43. Baroness Hale set out three forms of parent: the natural parent, the gestational parent and the psychological parent: '33. each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child [...]. For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain. 34. The second is gestational parenthood: the conceiving and bearing of the child. [...] While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other. 35. The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. [...] 36. Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique. In these days when more parents share the tasks of child rearing and breadwinning, his contribution is often much closer to that of the mother than it used to be; but there are still families which divide their tasks on more traditional lines, in which case his contribution will be different and its importance will often increase with the age of the child. 37. But there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others.'

the legal parents who also have exclusive parental responsibility, this is not always the case. In addition to legal parents, it has been discussed that a child might have a social parent such as a step-parent who lives with a legal parent of the child. These parental roles are likely to be important to the child.

It has also been shown above that existing bases for establishing parenthood in many states have evolved to take into account new possibilities of family formation. A clear example of this is evident with MAR processes and sperm donation, where the male or female consenting cohabitant of the woman treated will be presumed to be the child's legal parent at birth notwithstanding the absence of a genetic connection. In contrast, where a child is born using surrogacy (with or without donor gametes) outside of any national MAR framework, the law regarding parenthood is left almost entirely untouched. The reasons for separating surrogacy from other forms of assisted reproduction in this way need to be understood. While there is argument elsewhere that 'doing' parenting should not equate to legal 'status' as parents,⁶²³ it is at least open to question when, in the context of most surrogacy arrangements, someone initiates conception and intends to perform the social role of parent.

Steiner comments that despite developments in MAR procedures and the understanding of family structures, '*specialists in child law have stressed the fact that embedded in the law is an essential ambivalence over what degree of importance to attach to the genetic tie between a child and birth parents.*'⁶²⁴ It is this uncertainty about the nature of the parent-child genetic tie which has created tensions between different conceptions of parenthood, especially in the context of surrogacy with regard to intending mothers. In addition, the recognition and promotion of children's rights and human rights more broadly have arguably exacerbated the existing tensions in parent-child relationships⁶²⁵ and challenged the paradigm of the two-parent model.⁶²⁶

Discussions of multiple parentage typically address two general questions. The first is not whether a child should have two, three, or more legal parents but rather whether the

623 See J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at 190-197.

624 E. Steiner, 'The Tensions between Legal, Biological and Social Conceptions of Parenthood in English Law' [2006] 10(3) *Electronic Journal of Comparative Law*.

625 See on the concept of 'parent' in general, M. Freeman, *Understanding Family Law* (2007), 163-164. Note that according to Goldstein, Freud and Solnit, the role of psychological parent can be filled by any caring adult 'but never by an absent, inactive adult'. See J. Goldstein, A. Freud and A. Solnit, 'Beyond the Best Interests of the Child' [1973] 19, cited in Freeman, *Understanding Family Law* (Sweet and Maxwell 2007) 163. In the context of developments in Dutch law on the topic, M. Vonk, 'The Role of Formalised and Non-Formalised Intentions in Legal Parent-Child Relationships in Dutch Law' [2008] 4(2) *Utrecht Law Review*.

626 This is discussed further in Chapter 4. See M. Vonk, 'One, Two or Three Parents?', [2004] 18 *International Journal for Law, Policy and the Family* 114-116 and her dissertation 'Children and their Parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law' (Intersentia, Antwerp 2007), 229-242.

traditional concept of legal parentage is altogether appropriate for all families. To the extent that the law might recognise multiple parentage, the second question concerns what form that legal recognition should take. That is, should it be based on a pre- or post-birth parentage order, judicially pre-authorised surrogacy arrangements based on the intention of the parties or a model of *de facto* parentage determined after the child is born (i.e. social parentage based on the actions taken by the various parties during the pregnancy and/or after the birth of the child), or some combination of these factors?

Jackson argues that there is reason to depart from the two-parent model particularly in assisted reproduction situations and that it is wrong for the law to maintain a position of 'parental exclusivity'. For Jackson, the granting of parental responsibility to others who are not genetically connected to the child is an example of where the importance of social parenting is already recognised.⁶²⁷ This author agrees that these individuals have an important and very real contribution to make to a child's welfare. However, Jackson also accepts that even if a state were to move to a model where there were more than two (legal) parents, the law would still need to recognise the 'principal parents' at birth. There is reason to be concerned that if the number of legal parents were to increase, so could the risk of conflict.⁶²⁸ Also, in the case of inter-country surrogacy, there would be practical difficulties with child 'sharing' where the birth mother resides in another country. Furthermore, in some states, the effect of legal parentage also places an obligation on children to maintain their parents.

One way of relieving these tensions would be for the law to work towards a closer relationship between genetic and psychological parenthood with greater emphasis placed on adult acceptance of permanent parental duties and responsibilities towards a child. Indeed, in some jurisdictions, it is already possible to attribute parental responsibility to non-parents. Examples include England and Wales and several other Commonwealth jurisdictions, as well as the Netherlands, whereby parental responsibility is disconnected from the legal parentage.⁶²⁹ Moreover, in England and Wales (since the 1989 Children Act), Scotland, and several other Commonwealth jurisdictions (e.g., New Zealand), the number of persons who can be simultaneously given parental responsibility is not limited to two persons. Another way, albeit outside the scope of this thesis, is to critically analyse one particular aspect that is almost universally entrenched in each of the legal systems

627 J. Jackson, 'What Is a Parent' in A. Diduck and K. O'Donovan (eds.) *Feminist Perspectives on Family Law* (Routledge, Cavendish Oxford 2006).

628 See the decision of the Ontario Court of Appeal in *A. A. v. B. B.* 83 OR (3d) 2 January 2007 in which the Court recognized that a child can have three legal parents (in that case two mothers and a father).

629 According to Dutch law, a child can have no more than two legal parents and no more than two persons with parental responsibility, but they do not necessarily have to be the same persons.

(and elsewhere): the stipulation that a child may have no more than two legally recognised parents.⁶³⁰

Millbank observes that '[w]hen a child is being raised by his or her intending parents, it is those parents who are usually the primary care-givers and the child is therefore in need of a legal relationship with those individuals. This need is irrespective of any partial or complete genetic link; it is not about an entitlement to parental status but, rather, it is about who is actually doing the parenting.'⁶³¹ It is a valid question to ask whether parenthood should be based on genetic linkage or be shifted or complemented by parenthood to include, as a suitable basis, intention, which in most cases of gestational surrogacy will often coincide with the genetic kinship. In fact, a legal model for such an intentional parenthood already exists and is in coexistence with the parentage based on genetic linkage: adoption.⁶³²

As Singer has suggested, broader legal understandings of parenthood and family are necessary to account adequately for the range of parent-child relationships that are already possible – including surrogacy – and that may occur in the future.⁶³³ If surrogacy arrangements are to be regulated rather than tolerated or ignored, it has been established that in most states, existing rules for establishing parentage will not be able to resolve the legal status issues raised by surrogacy.

3.15 INITIAL CONCLUSIONS DRAWN FROM THE COMPARATIVE REVIEW IN THE CONTEXT OF NATIONALITY AT BIRTH

From the comparative review, it can be concluded that only Austria, the UK, and the USA have nationality rules applying expressly to cases of surrogacy but not one of those states provides all of the answers.⁶³⁴ The determination of nationality depends upon the genetic relationship between at least one of the intending parents and the determination of parentage. In the other research legal systems, if parenthood is established, the nationality rules usually provide for the establishment of nationality for the surrogate-born child. France, in contrast, provides a discretionary grant of nationality.

The approaches of the research legal systems to the acquisition of nationality by children evidence that, in many states, nationality laws have not yet 'caught up' with developments

630 In the context of lesbian co-parenthood, see M. Antokolskaia, 'Legal Embedding Planned Lesbian Parentage. Pouring New Wine Into Old Wineskins?' [February 2014] *Familie & Recht*. For Antokolskaia 'the right question is not whether a child should have two, three or more legal parents, but rather whether the traditional concept of legal parentage is altogether appropriate for such families.'

631 See J. Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-Mothers, Surrogate Parenthood and Fathers' Rights' [2008] 16 *Feminist Legal Studies* 141.

632 See the discussion at 3.13.

633 A. Singer, 'The Right of a Child to Parents' in K. Boele-Woelki, N. Dethloff and W. Gephart (eds.) *Family Law and Culture in Europe – Developments, Challenges and Opportunities* (Intersentia 2014), 148.

634 It is also understood that Norway has legislated to provide nationality rules.

in surrogacy.⁶³⁵ Interestingly, it has emerged that nationality legislation in some states does not often specify whether the word ‘parent’ for the purposes of national law should be taken to mean the child’s genetic or legal parent(s). As a result, nationality legislation may often assume that the genetic and legal parent of a child will be one and the same person, causing difficulties where this is not the case. In addition, in some states, if legal parentage is determinative for the acquisition of nationality by descent and a case has foreign connections, it may not be clear which law should apply to determine the question of who is or are the child’s legal parent(s). Both the Federal Court of Australia⁶³⁶ and the Federal Court of Canada⁶³⁷ have, as part of appeals to administrative reviews, had to consider the statutory interpretation of ‘parent’ within the meaning of their respective citizenship acts. The Federal Court of Australia (two cases decided side-by-side (neither of which was a surrogacy case)) held that ‘parent’ should be given its ordinary meaning, thus firmly rejecting the submission that it could only mean a biological or genetic parent, and the Federal Court of Canada, in a 2-1 ruling (a surrogacy case), held that ‘parent’ requires a biological or genetic link.

A further problem, which has also been identified by the Permanent Bureau of the Hague Conference, is that even if nationality legislation provides a clear definition of who is considered to be a ‘parent’ for the purposes of the law on nationality, this may not always coincide with the rules concerning the establishment of legal parentage in family law, leaving the possibility that a child has a legal parent according to the law of the state but one who cannot pass his or her nationality to the child or vice versa.⁶³⁸ And, although this is more of an observation, some parents may misunderstand the granting of citizenship (which applies for that sole legislative purpose) as symbolic, more broadly, of a grant of parental status applicable for all purposes.

France offers one example of a state that has adopted an approach to mitigate the risk that the child is not stateless and to enable the child to travel to and remain in France. The publication of Circular CIV/02/13 on 25 January 2013 relative to the issuance of CFN to children born abroad of French citizens now enables the French civil status registry to record surrogate-born children as French nationals.⁶³⁹ However, the approach is more of a discretionary nature rather than legally certain.

635 See also the observations set out in HCCH Study 2014 at 1(f).

636 In *H v. Minister for Immigration and Citizenship* [2010] FCAFA 119, the Federal Court of Australia concluded that the word ‘parent’ found in an Australian legislative provision similar to paragraph 3(1)(b) of the Citizenship Act should be given its ordinary meaning, thus firmly rejecting the submission that it could only mean a biological or genetic parent. This approach was at variance with that of the Australian Department of Immigration and Citizenship.

637 *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85 (CanLII).

638 E.g., Switzerland and France. HCCH Prel. Doc. No 10 of March 2012.

639 The CIV is available at: <www.gisti.org/IMG/pdf/circ_20130125_norjusc1301528c.pdf>. See also <www.lexpress.fr/actualite/societe/meres-porteuses-que-change-la-ciculaire-taubira-sur-la-gpa_1215190.html>.

In the state in which genetic and legal connections are required, legal parentage established abroad (evidenced by a foreign birth certificate or court order from the state of birth) will usually satisfy the required legal connection but DNA tests will often be required (particularly if the surrogate is married). If no genetic connection exists, it may still be possible for the child to acquire nationality by descent if the child's legal parent is a national and there is a parent-child relationship. The current general approach is to grant citizenship by descent to children born abroad if there is one genetic intending parent (and, in very limited circumstances, if there is no intending parent with a genetic link). This approach is understandable, as it usually avoids statelessness but it is usually not expressly authorised by statute.

3.16 EMERGING PROBLEM AREAS

It has largely been left to states to decide what legal recognition, if any, will be given to these families and what protection surrogate-born children raised in these families will have. Having considered the differing and conflicting approaches to surrogacy, a number of problem areas emerge.

3.16.1 *Terminology – Lack of agreed definitions of key words*

Not only the practice of surrogacy but also the language used in surrogacy is contested. Ergas is critical of the use of language in the surrogacy context, writing that the current language of surrogacy is:

Normatively freighted, implicitly indicating how one ought to think: it is acceptable for eggs and sperms to be transferred because they are donated, not sold; it is acceptable for the gestational carriers to have contractual rather than parental rights because they are providing a service for third parties; it is acceptable to restrict references to parenthood to the intended parents as the other parties involved are only providers of either raw materials or services (in fact, surrogacy is the vehicle whereby the intended parents realize their parenthood, which is what is intended, presumably, by all the parties).⁶⁴⁰

Aside from the definitions surrounding parenthood (birth mother, surrogate mother, intending parent, commissioning parent or perspective parent, co- or second par-

640 Y. Ergas, 'The Trans-nationalization of Everyday Life: Cross-Border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law' (Colombia University 12 March 2012), at 19.

ent/father/mother), the financial aspects of surrogacy involve a number of key terms (e.g., improper financial or other gain, reasonable expenses, compensation versus remuneration).⁶⁴¹ The lack of harmonised and accepted definitions may lead to ambiguity, inconsistent interpretations, and different uses within states. In addition, the study and discussion of financial issues become more difficult, and knowing what can be considered as ‘proper’ or ‘improper’ financial or other gain⁶⁴² or ‘reasonable’ fees also becomes unclear. The terminology of the medical aspects of surrogacy also requires attention.⁶⁴³ Many definitions used in MAR vary in different settings, making it difficult to understand and compare procedures in different countries and regions.

While this review demonstrates that there is no consensus on appropriate terms, an important finding is that language and vocabulary matter because of the ways in which they frame debates and inform public opinion. There is another important reason to discuss terminology because any national or international system can only work if it uses a vocabulary that is understood by the different legal systems in which it has to be applied. Without clarification, there are likely to be questions with respect to statutory definitions or interpretations. Thus, if it is to be concluded, as discussed in Chapter Six, that rules on parentage and nationality in the context of surrogacy are necessary, they must be formulated in terms that make sense in all the legal systems involved.

3.16.2 *Uncertain civil status*

It has been shown that the differing recognition policies at the national level and the lack of a specific legal instrument dealing with recognition of civil status documents at the supranational level may result in a situation that a parental status established in one state may not be recognised in another state after that child’s movement or migration. The consequence of the non-recognition is the non-continuity of the child’s personal status and thus a (multiple) limping legal relationship. The determination of who has legal parentage for a child is very likely to have far-reaching consequences, which will affect the child not only in childhood but also into adulthood.

The comparative review demonstrates that the *ad hoc* solutions, if any, adopted by national judicial and administrative authorities in a number of countries attempt to remedy

⁶⁴¹ This is considered in Chapter Two.

⁶⁴² See the African Child Policy Forum, ‘Africa: The New Frontier for Inter-country Adoption’, Addis Ababa, 2012, available at: <www.africanchildforum.org>.

⁶⁴³ The glossary of terms used by the ICMART and WHO offer an approach. See ‘International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009’) available at: <www.who.int/reproductivehealth/publications/infertility/art_terminology2.pdf>.

this but, as a whole, these solutions are usually far from adequate. There are at least two reasons for this.

First, in many jurisdictions, the procedures used to find solutions were originally not designed for surrogacy situations and are therefore not necessarily suitable for application to surrogacy cases. As a result, the procedures are often very complex and lengthy, often with the consequence that the intending parents and the surrogate-born children have little option to remain in the country of birth for an extended period of time on the basis that they wish to 'regularise' the situation in satisfaction of national and/or Consular practice.

Second, in addition to their *ad hoc* nature, these remedies usually only offer partial solutions, whereby the position of the intending genetic father is regularised. The position of the intending mother (or the other intending parent) remains uncertain in most of the research jurisdictions, often with no or limited options of establishing legal parenthood. Although in practice each legal system reviewed would allow the intending parents to care for the child on a day-to-day basis, national law in each of the legal systems does not acknowledge them both as the child's legal parents. This is not a position to be accepted lightly. The lack of status means, for example, that the second parent has no status to apply for the child's travel documentation and exercise parental responsibility and is likely to have a profound effect, for example, if the couple separate. The family of the second intending parent also lacks a legal relationship with the child.

3.16.3 *Birth records and registration*

Over and above issues of parental status and nationality, the comparative review has also illustrated that surrogacy has considerable implications for the completion and preservation of birth records. How the parents and child are registered on public record is of importance to any right the child may have to information about that child's genetic and/or biological origins. Yet, in the states in which surrogacy is authorised, the child's access to his or her origins has not seemingly been an obvious concern of the law-maker. Two approaches emerge. Either the intending parents are registered as the child's parents from the time of birth – in this case, no mention of the surrogate is likely to appear on the documents of the public registry – or the intending parents become the child's legal parents later, via a transfer of parenthood and a record is kept of the child's origins.

In most states in which it is possible to transfer legal parentage to intending parents following a surrogacy arrangement, it is assumed (albeit not clearly demonstrated) that similar principles apply to the birth records of the child as those which apply in adoption cases, thus meaning that the child will be issued a new birth certificate once the transfer of legal parentage has taken place with no mention of surrogacy (but the fact of surrogacy

will remain on the state record, which will usually be confidential and accessible to the child upon attaining a defined age). In the UK, the child is registered on the central birth register as having been born from the surrogate (and her husband, if this is the case), and parenthood is only transferred to the intending parents following a parental order. Thus, in the UK, with the issuance of a parental order, a new birth certificate is issued, which will not disclose the fact of the surrogacy, albeit the birth history is recorded. In similar ways as an adoptee, the child born through surrogacy will be able to have access to his or her original birth certificate (from the age of 16 years in Scotland, 18 years in the remaining parts of the UK).

In most states in which surrogacy is prohibited or unregulated (in the sense that there being no surrogacy-specific mechanism to establish legal parentage for the intending parents), the fact of a surrogacy arrangement is unlikely to be recorded anywhere because the child's legal parentage will be established according to legal parentage rules, irrespective of the surrogacy arrangement. If an adoption subsequently takes place, in most states, the child's birth certificate will be re-issued following the adoption and will not disclose the fact of adoption or the surrogacy. However, the adoption will remain on the state records, and most states provide avenues for a child to have access to the full record, often upon attaining majority.

Satisfying these interests makes it possible for these children to trace their biological and genetic origins. However, not all donor offspring wish to know the identity of a surrogate or donor. For these children, the right not to know is a competing interest which should also be respected. Even those who wish to exercise their right to information (discussed in Chapter Four) may have an interest in keeping information about the surrogate or donor private from others. The interests of the surrogate and donor cannot be ignored either. Surrogates may feel that they should be able to make decisions about private family matters without unnecessary interference from the state.⁶⁴⁴

It is likely that the current practices will mean that many individuals born from surrogacy arrangements, inter-country surrogacy in particular, will be unable in the future to obtain information about either the surrogate or any donors of gametes. The situation has been viewed as similar to adoptees and donor-conceived individuals who were or have been denied access to information about their genetic or gestational origins.

3.16.4 *Possible lack of political will to respond to the problems created by surrogacy*

Despite legislative changes in California, legislative proposals in Belgium and in India, and the pending state review of the Netherlands, few states are actively responding to legislate

⁶⁴⁴ See the observations of the HCCH 2014 Study.

to respond to the consequences of surrogacy. This may be a result of a possible lack of political will to respond to surrogacy. Indeed, given the relatively low (but nevertheless unknown) numbers of surrogacy, states may not consider surrogacy as a legislative, let alone political, priority.

3.16.5 *An unregulated international market around surrogacy*

Inter-country surrogacy is transforming ‘*into nothing short of a market*.’⁶⁴⁵ The market for the industry has found customers for intending parents who cannot have children, same-sex male couples, single people, and others who are willing to pay for surrogacy services. In some states, a whole business has been built around surrogacy.⁶⁴⁶ There are many hidden economic interests. Abuses (financial or duress) can easily occur in private surrogacy arrangements because they usually take place in a context of more limited oversight of authorities. This leads to possible questions concerning the surrogate’s ability to give free, unconditional, and informed consent and the associated question with respect to the timing of that consent. When a surrogate consents to inter-country surrogacy, how much consideration is given to safeguarding whether the surrogate fully understands the implications of what she has agreed to? It may lead some people, overwhelmed by a desire to have a child, to be more likely to offer money in exchange for the facilitation of the process. Parenthood in the context of surrogacy and MAR appears to have a monetary value and society (national and international) needs to be open about this – but how?⁶⁴⁷

Another worrying development is the rise in what might be termed private or ‘DIY-surrogacy’ arrangements, which are established largely through the internet. These arrangements remain entirely unregulated, are often illegal, and are fraught with difficulties. The English case of *CW v. NT and another*⁶⁴⁸ highlights some of the difficulties that can arise with informal arrangements made over the internet. In that case, an informal arrangement was made whereby the surrogate would be inseminated by the father and would hand over the child to the intending parents upon birth. The surrogate changed her mind. This led to a dispute over the terms of the agreement. The English court was left to decide where the child should live and, on the facts, held that the child should live with his birth mother rather than the intending couple.

645 See Parliamentary Assembly of the Council of Europe, Rec. 1443 adopted by the Assembly on 26 January 2000 (5th sitting) available at: <www.assembly.coe.int>, under ‘Documents’ then ‘Adopted texts’.

646 E.g., the website of Texas-based Medical Tourism Corporation has an entire page dedicated to ‘low cost surrogacy’ in India: <www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php>.

647 In Chapter Six, consideration is given as to how to respond to the very real issue of payment in order to suggest a framework for domestic and international responses.

648 [2011] EWHC 33.

3.16.6 *Wide variation and absence of limits, specifically on fees and costs*

If surrogacy takes place, it generally involves some payment to the surrogate and to intermediaries. Payment may vary between reimbursement of expenses (e.g., medical costs, pre- and/or post-natal loss of wages) and a substantial fee. It can be observed from the case law reviewed in Part One that intending parents often find surrogates through an intermediary who assists with the searching and matching process and with price setting. This intermediary often takes the form of a surrogacy firm or broker. The intending parents usually pay both the surrogacy firm and the prospective surrogate. After screening prospective surrogates, the surrogacy firm lets the intending parents select from an array of candidates. Quality control is another function that some surrogacy agencies provide; meaning, the intermediary screens prospective surrogates to ensure that they are responsible, healthy women who will take care of themselves during the pregnancy and fulfil their obligations. Although there may be cases in which no agent is involved or in which the surrogate receives no remuneration, for example, where the surrogate and the intending mother are related or are friends, payments are usually made.

There are wide variations in the fees and costs charged by surrogates and costs charged by intermediaries. One American website reads:

What It Costs

When you calculate the cost of using a surrogate, there are many factors that come into play and can greatly impact the final equation. First, whether the surrogate is working independently or going through an agency can affect the final fee, but generally the entire process from start to finish can run up to \$100,000 or more when you add in all of the related costs.

This includes a surrogate's fee that is often in the range of \$10,000 to \$20,000. But keep in mind this is just the beginning of your financial investment. You can also assume that you will incur legal and agency costs of between \$15,000 to \$30,000 to handle all of the logistics and paperwork involved. If your surrogate has health insurance that will cover her pregnancy, this will help to minimize some of the medical costs, but the policies in regard to surrogacy are not very advanced at this point, and some health insurance companies may exclude coverage for this situation.

Other Expenses

In addition to the surrogate fees and agency and legal expenses, this \$100,000 investment also includes the medical costs of the regular prenatal visits, tests

and the delivery, which can total upwards of \$10,000, depending on where you live and the specifics of each case. Even if insurance coverage is provided, you may still have to pay for some of the procedures involved for you and the surrogate, such as in-vitro fertilization and artificial insemination. For instance, an egg donor alone can cost you another \$4,000 to \$10,000. And the cost of these procedures depends on what's involved and how many times they need to be repeated. In addition, some insurance companies have co-pays or deductibles for services that you will need to include on your list of expenses. Other things that can bring the total up to and often beyond the \$100,000 mark include cost of maternity clothes, prenatal vitamins, and other living costs for the surrogate that you might need to cover, depending on the situation. If the surrogate has other children, you may need to cover child care for them during doctor's visits and labor, and if the surrogate must be on bed rest during some or all of the pregnancy, you will often need to make up for lost wages.⁶⁴⁹

Surrogacy is clearly not within the means of all income groups. The Warnock Report (albeit in the context of 1997) quotes: '*It was reported that the charge to the intended couple for [the surrogacy service] service, including medical and legal expenses and payments to the surrogate mother, amounted to £30,000.*'⁶⁵⁰ In its working paper on surrogacy, the French Senate writes in 2008 with respect to the cost of surrogacy in California: '*le prix d'une gestation pour autrui s'élève en moyenne à 60 000 dollars (un peu moins de 41 000 euros), mais peut dépasser 100 000 dollars (un peu moins de 68 000 euros).*'⁶⁵¹

From a selection of the reported cases presented in this chapter, in addition to fees to the clinics, intermediaries and lawyers, payments to the surrogate can vary from approximately USD 2,500 to USD 70,000⁶⁵² plus medical and other expenses depending on the jurisdiction of residence of the surrogate, the intending parents, and whether intermediaries are engaged:

Case Citation	Relevant Jurisdictions	Fees
France		
No reported judgment lists fees/costs paid to the surrogate or any agency or third party		
Switzerland		
No reported judgment lists fees/costs paid to the surrogate or any agency or third party		

649 L. Ellis, 'What It Costs for a Surrogate' (no date), available at: <www.whatitcosts.com/privacy-policy.htm>.

650 Warnock Report at para. 1.10.

651 Working report of the French Senate 'La gestation pour autrui', from the Législation Comparée Series, available at: <www.senat.fr/lc/lc182/lc182.pdf> at 33.

652 The underlying concern raised in the cases is that the true picture of the costs involved rarely is discovered and, as such, it is possible that the costs paid are considerably higher.

Case Citation	Relevant Jurisdictions	Fees
Austria		
No reported judgment lists fees/costs paid to the surrogate or any agency or third party		
Netherlands		
No reported judgment lists fees/costs paid to the surrogate or any agency or third party		
Belgium		
<i>Civ. Antwerp, 19 December 2008 and Youth Court Antwerp, 22 April 2010: case Hanne and Elke</i>	<ul style="list-style-type: none"> – Belgium and the Ukraine – Ukrainian surrogate mother and heterosexual Belgian intending parents. The intending parents are also the genetic parents of the children (gestational surrogacy) 	<ul style="list-style-type: none"> – EUR 30,000 was paid by the intending parents to the Ukrainian law firm – According to the parties, these costs aimed at covering not only legal advice but also the practical aspects of surrogacy: fees relating to travels, translations, contact with professionals in a private fertilisation clinic, attempts to perform IVF, ultrasounds, medical follow-up of the surrogate, etc
<i>Ghent (15th ch.), 30 April 2012</i>	<ul style="list-style-type: none"> – Belgium 	<ul style="list-style-type: none"> – Finding that an amount of EUR 1,600 per month was paid monthly by the parents to the surrogate (Total of EUR 14,400), the Court refused to grant the adoption, considering that an adoption resulting from the finding of a commercial surrogacy would run contrary to domestic law and public policy
Spain		
No reported judgment on fees/costs paid to the surrogate or any agency or third party		
UK		
<i>X and Y (Foreign Surrogacy) [2008] EWHC 3030</i>	<ul style="list-style-type: none"> – England and Wales and Ukraine – Married, heterosexual couple domiciled in England entered into a surrogacy agreement with a married Ukrainian surrogate mother 	<ul style="list-style-type: none"> – EUR 235 per month to the surrogate during the pregnancy and a lump sum of EUR 25,000 on the birth of the twins (Total of EUR 27,115) plus expenses – Payments were not sufficiently disproportionate to expenses reasonably incurred to be an affront to public policy – Parental order made

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

Case Citation	Relevant Jurisdictions	Fees
<i>Re S (Parental Order) [2010] 1 FLR 1156</i>	<ul style="list-style-type: none"> – England and Wales and California (USA) – Married, heterosexual couple domiciled in England entered into a surrogacy agreement in California 	<ul style="list-style-type: none"> – Intending parents had paid the sum of USD 23,000 to the surrogate but were unable to account for how that sum was used by the surrogate – Parental order made
<i>L (A Minor) [2010] EWHC 3146</i>	<ul style="list-style-type: none"> – England and Wales and Illinois (USA) – A commercial surrogacy agreement made in Illinois (USA), made by a British married couple 	<ul style="list-style-type: none"> – The sum paid is not reported in the judgment, but the court finds that the payments made in this case were in excess of reasonable expenses – Parental order made
<i>A and A v. P, P and B [2011] EWHC 1738</i>	<ul style="list-style-type: none"> – England and Wales and India – Married British couple entered into a surrogacy arrangement with an Indian surrogate mother 	<ul style="list-style-type: none"> – The total payments made directly to the surrogate were about £4,500. This sum is made up of a combination of payments for loss of earnings, an after delivery charge and other relatively modest payments – Court finds that the payments were more than expenses reasonably incurred (it was understood the loss of earnings figure was based on two years loss of earnings). There is no evidence in this case of Mr. and Mrs. A acting in anything other than the utmost good faith, or that the level of payments or the circumstances of the case could be said to have overborne the will of the surrogate mother – Parental order made
<i>Re X and Y (Children) [2011] EWHC 3147</i>	<ul style="list-style-type: none"> – England and Wales and India – British married couple entered into a surrogacy arrangement with two Indian surrogate mothers 	<ul style="list-style-type: none"> – The financial agreement between Mr. and Mrs. A and each surrogate provides for a payment of EUR 3,000 approximately (200,000 Indian Rupees) in compensation payable in installments: 15,000 Rupees on embryo transfer; 10,000

Case Citation	Relevant Jurisdictions	Fees
		<p>Rupees on confirmation of pregnancy and for every month of the pregnancy; the balance remaining to be handed over on birth and handing over the child</p> <ul style="list-style-type: none"> – The monthly maintenance was said to cover all genuine expenses associated with the pregnancy and Mr. and Mrs. A were to pay, in addition, all medical expenses and medication costs – Court accepted that Mr. and Mrs. A were genuine and the payments not disproportionate – Parental order made
<i>D and L (Surrogacy) [2012] EWHC 2631 (Fam)</i>	<ul style="list-style-type: none"> – England and Wales and India – British-Belgian male couple in a civil partnership and Indian surrogate. Twins were born 	<ul style="list-style-type: none"> – Sum of USD 27,000 paid to the clinic on the basis that the clinic would then pay 'reasonable expenses' to the surrogate in the sum of 350,000 Indian Rupees, approximately £4,000 – Applicants accept that the sums paid exceed a level that could be described as 'reasonable expenses' – Parental order made
<i>Re A & B (Parental Order Domicile) [2013] EWHC 426 (Fam)</i>	<ul style="list-style-type: none"> – UK resident American-Polish same-sex couple in a domestic partnership (recognised in the UK as a civil partnership) and Indian surrogate 	<ul style="list-style-type: none"> – Applicants made payments, via the Indian clinic, to the surrogate totalling 260,000 Indian Rupees (approximately £2,958) – The applicants conceded that this payment was for more than 'expenses reasonably incurred' – Court satisfied that no evidence to suggest that the payment overbore the will of the respondent, or in any other way put undue pressure on her – Parental order made
<i>J v. G [2013] EWHC 1432 (Fam)</i>	<ul style="list-style-type: none"> – England and Wales and California (USA) 	<ul style="list-style-type: none"> – The applicants made payments to the first

Case Citation	Relevant Jurisdictions	Fees
	<ul style="list-style-type: none"> British nationals in a civil partnership resident in the UK engaged a Californian resident surrogate mother. They were awarded paternity orders by the Californian court in advance of the twins' birth, allowing them to be named on the children's US birth certificates 	<p>respondent totalling USD\$56,750 (plus expenses), broken down as follows:</p> <ul style="list-style-type: none"> i. USD 2,750 as an allowance for unspecified 'incidental expenses' ii. USD 1,000 inconvenience fee for the IVF transfer iii. USD 53,000 pregnancy compensation fee to the surrogate. This is made up of the base fee of USD 45,000, an additional payment of USD 5,000 for a twin pregnancy and a further sum of USD\$3,000 as compensation for giving birth by caesarean section <ul style="list-style-type: none"> Other payments were made in accordance with the terms of the agreement, but these are referred to as identified expenses The payments in this case were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy. There is no evidence to suggest that they were of such a level to overbear the will of the surrogate. The surrogate was an experienced surrogate with financial means. The surrogate had also been a surrogate twice before. She had legal advice before entering into the agreement and was able to command a higher compensation fee because of her proven track record Parental order made

Case Citation	Relevant Jurisdictions	Fees
<i>Re W [2013] EWHC 3570 (Fam)</i>	<ul style="list-style-type: none"> – England and Wales and Nevada (USA) – The applicants (Singaporean mother domiciled in the UK and Malaysian father also domiciled in the UK) entered into a commercial surrogacy agreement with an agency in California using a surrogate resident in Nevada. The legal issue concerned whether an undisclosed ‘gift’ payment of USD 38,500 could be construed as unlawful, and therefore be a criminal offence under Nevada state law 	<ul style="list-style-type: none"> – The applicants made payments to the surrogate and clinic totalling USD 71,808 (plus expenses), broken down as follows: <ul style="list-style-type: none"> i. USD 22,000 for administrative and ‘other’ services (paid to the agency) ii. USD 38,500 compensation fee/‘gift’ payment to the surrogate iii. A monthly allowance to the surrogate of USD 200, housekeeping costs (USD 2,040), and counselling costs (USD 5,375) iv. A number of one off voluntary gifts totalling USD 2,093 – It was held in this case that the payments made were not disproportionate to the surrogate’s reasonable monthly living expenses and so the surrogate was not ‘bought’ in violation of public policy – Furthermore, although the payment of USD 38,500 was conceded to be a payment other than for ‘expenses reasonably incurred’ and was unlawful in Nevada; it was not a criminal offence as the intending parents acted in good faith and had no prior knowledge of the law in Nevada
<i>Re P-M [2013] EWHC 2328 (Fam)</i>	<ul style="list-style-type: none"> – England and Wales and California – Twin babies were born in California through a surrogacy arrangement between the surrogate mother and the applicants who were both British. The court decided that under s54 (8) HFEA 2008 a parental order could be 	<ul style="list-style-type: none"> – The applicants made payments to the surrogate totalling just over USD 17,700 (plus certain travel expenses were not taken into account) – The second payment to the agency totalled USD 48,000, of which \$21,500

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

Case Citation	Relevant Jurisdictions	Fees
	established in relation to the welfare of the child	<p>was the profit element of the clinic</p> <ul style="list-style-type: none"> – It was held that both payments were not disproportionate to the expenses incurred and that the applicants acted in good faith and thus made a parental order
<i>Re C [2013] EWHC 2408 (fam)</i>	<ul style="list-style-type: none"> – England and Wales and California (USA) – Application for a parental order by a UK domiciled couple following a surrogacy arrangement entered into by both parties through a surrogacy agency in California 	<ul style="list-style-type: none"> – The applicants made payments totalling USD 62,145 of which \$38,000 was found to be compensation for the surrogate. The total payment and expenses paid to the surrogate and her husband amounted to \$51,200 – The court was satisfied that the sums paid were not disproportionate to the reasonable expenses and so were not an affront to public policy
<i>Re WT [2014] EWHC 1303 (Fam)</i>	<ul style="list-style-type: none"> – England and Wales and India – An unmarried heterosexual couple commissioned a surrogacy arrangement through an Indian clinic. The child was born of a donor egg and the male applicant's sperm 	<ul style="list-style-type: none"> – The applicants made payments totalling nearly USD 28,000 of which the surrogate received USD 5,834.50 – The court agreed that the sum of money paid to the surrogate was not too low as to be exploitative, and that the payments made other than for 'expenses reasonable incurred' could be authorised as the applicants acted at all times in good faith and with no moral taint – Parental order made
India		
<i>Baby Manji Yamada v. Union of India, A.I.R. 2009 S.C. 84</i>	– India and Japan	<ul style="list-style-type: none"> – The applicants made payments to the first respondent totalling USD 7,875, plus a monthly allowance of USD 105 for the duration of the pregnancy
USA (California)		
<i>Johnson v. Calvert, 20 May 1993</i>	– California	<ul style="list-style-type: none"> – USD 10,000 payment in instalments to the surro-

Case Citation	Relevant Jurisdictions	Fees
	– The Californian Supreme Court sanctioned commercial surrogacy in this case, as the payments to the surrogate were made in installments, which was more in line with public policy. Furthermore, the intending mother was genetically linked to the child, giving her an equal claim to maternity of the child	gate and the provision of a USD 200,000 life insurance policy
<i>In re Baby M</i> , 3 February 1988	– California, New Jersey	<ul style="list-style-type: none"> – USD 10,000 lump sum payment and additional costs to intermediary of USD 7,500 – Mary Whitehead agreed to be a surrogate carrier for the Stern couple for a fixed fee. After the birth, Mary absconded with the child but was caught three months later. The child was returned to the Stern couple but Mary was granted limited visitation rights. The surrogacy agreement was upheld initially, although it was overturned by the Supreme court due to the payment aspect being in violation of public policy, amounting to ‘baby buying’
<i>Re Marriage of Moschetta</i> , 25 Cal. App. 4th 1218 (1994)	<ul style="list-style-type: none"> – California – Traditional surrogacy agreement between a heterosexual married couple and a surrogate 	– USD 10,000 lump sum payment to the surrogate for ‘living expenses’
<i>Superior Court of California, County of San Francisco, Case No. CGC 01 401717</i>	<ul style="list-style-type: none"> – California – A British national acted as a surrogate for an American couple; however, the surrogacy agreement broke down over the request that one of the foetuses be aborted in the case of twins as set out in the written contract 	– A USD 20,000 payment was to be made in installments. The surrogate received only USD 1,000 of the original amount promised after she refused to abort one of the foetuses

A number of preliminary conclusions can be made. It appears from the comparative review that national authorities and courts are (i) not addressing the question of quantum with

any particular clarity or detail⁶⁵³; or, if they do, (ii) considering the quantum in the context of whether the intending parents have acted in good faith and without moral taint in their dealings with the surrogate; and/or (iii) whether the applicants were party to any attempts to defraud the authorities.⁶⁵⁴

In the UK, the question whether a payment exceeds the level of 'reasonable expenses' also appears to be a matter of fact in each case. There is no conventionally recognised quantum of expenses or capital sum. Where the applicants for a parental order are acting in good faith, with no attempt to defraud the national (home) authorities, and the payments are not so disproportionate that the granting of parental orders would be an affront to public policy, it will ordinarily be appropriate for the court to give retrospective authorisation, having regard to the paramountcy of the children's welfare.

The lack of transparency is, however, of particular concern, when courts or national authorities are not aware of the costs involved and this may be a result of reluctance for intending parents to disclose information with respect to the financial aspects. For example, intending parents may be reluctant, even if they have that information, to talk openly about those matters. Discretion, pride, and sometimes embarrassment might be reasons for the silence on this topic. Lack of transparency makes it difficult to know the real use of the money, which may lead to corruption and/or exploitative practices. The destination of the funds can also be hidden or blurred. It may be unclear which part of the total amount paid goes directly to the surrogate or an intermediary or agent and at what stage of the process these payments (for expenses or other) are made.

3.16.7 *Reproductive travel and surrogacy*

Storror observes that the phenomenon of cross-border reproductive travel has three significant legal dimensions.⁶⁵⁵ First, laws that ban or restrict access to MAR procedures in one country lead couples (or individuals) to travel to other countries to obtain, to contribute to, or to provide assisted reproductive services. Second, the law may expressly criminalise crossing borders to be a surrogate, to be a donor for, or to perform or obtain certain procedures. Third, the law may refuse to recognise intending parents as the parents of the child they have crossed borders to conceive.

It is possible to restrict the possibility of reproductive travel in the surrogacy context by requiring that the intending parents must have a connection with the jurisdiction in which the surrogate is habitually resident, such as that they must reside in the jurisdiction

653 Aside from the UK, very few of the national courts in the reported cases set out the fees involved.

654 [2009] 1 FLR 733 at para. 21.

655 R. Storror, 'Assisted Reproduction on Treacherous Terrain: the Legal Hazards of Cross-border Reproductive Travel' [2011] 23(5) *Reprod Biomed Online* 538-45.

for a minimum period of time.⁶⁵⁶ Such limits have been established in some countries, such as the UK,⁶⁵⁷ certain states of Australia⁶⁵⁸ and Greece.⁶⁵⁹ South Africa offers another example of a restricted approach. A court in South Africa has ruled that foreigners wishing to engage a surrogate must intend to live in South Africa on a long-term basis, a decision that mirrors with South Africa's tight regulations on foreigners wishing to adopt South African children, who are also required to demonstrate that they will settle in the country.⁶⁶⁰ But in other jurisdictions, such as California, the Ukraine or India, it does not matter if the intending parents are foreign nationals or residents of another state; the limit is one of costs.

3.16.8 *Real dangers, weak sanctions, and ineffective deterrents*

Another element relating to inter-country surrogacy arrangements is the role of criminal law. As has been discussed above, in many states, entering into a commercial surrogacy arrangement may amount to a criminal offence. While in many states, the legislation relates only to surrogacy arrangements entered into within the state territory, in some states, the legislation expressly has extra-territorial effect.⁶⁶¹ With increasing numbers of intending parents entering into these arrangements, states should take a more stringent approach to applying and developing their criminal laws. Of equal concern is the picture that has emerged of intending parents without parental responsibility or authorisation from the state of birth of the child travelling with children across state borders.⁶⁶²

Of further concern are the dangers for the child inherent in the fact that there may be, in most states where surrogacy is undertaken, no (or few) checks concerning intermediaries and agents. This has resulted in cases where children have been 'commissioned' for abuse

656 The Model Act for surrogacy proposed by the American Bar Association provides for a minimum period of 90 days: see S. Snyder, 'Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology' [2008] Family Law Quarterly 203-229.

657 Section 54(4)(b) HFEA 2008. Note also the requirement of domicile.

658 J. Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls' [2011] 35(1) Melbourne University Law Review.

659 In the UK, either or both of the commissioning parents must be domiciled (in the common law sense) in a part of the UK, the Channel Islands or the Isle of Man (section 54(4)(b) HFEA 2008). In Greece, the application of the Greek Civil Code rules relating to surrogate motherhood is conditioned on the fact that both the intended mother and the gestational mother are domiciled in Greece: see <www.ciec1.org/Legislation-pdf/Grece-Loi3089-2002-19decembre2002PMA-VersionsFr-Ang-Alld-Gr.pdf>.

660 See 'South Africa Tightens Rules for Foreigners to Make Families' *The New Age* (13 October 2011) available at: <www.thenewage.co.za/31768-1007-53-SA_tightens_rules_for_foreigners_to_make_families>.

661 E.g., Australia (Queensland and New South Wales): the criminal offences all relate to commercial surrogacy arrangements.

662 It is not known whether any authority has ever actually picked up on this at a national border or subsequently but the risk is potentially there if national authorities were being scrupulous.

as well as child-trafficking concerns.⁶⁶³ In *Huddleston v. Infertility Centre of America*,⁶⁶⁴ the surrogate was artificially inseminated with the intending father's sperm. She handed the child over to the father after the child's birth. The child died six weeks later as a result of repeated physical abuse.

A Taiwanese company based in Vietnam has been accused in the media 'of trafficking Vietnamese women to breed.'⁶⁶⁵ Another form of trafficking brought to the attention of the Special Rapporteur on a Mission to Thailand is trafficking for surrogacy. The Special Rapporteur 'was informed that 15 Vietnamese women were reportedly brought to Thailand by a Taiwanese company that offered surrogacy services online for childless couples. The women reportedly came to Thailand on the promise of a well-paid job. Upon arrival in Thailand, the women's passports were reportedly withheld and they were confined to the company's premises against their will. When the authorities raided the premises in March 2011, two of the 15 women had already given birth and seven of them were pregnant.'⁶⁶⁶ A worrying practice is where the child is fraudulently registered with the civil authorities as the natural child of the intending parents.⁶⁶⁷

Three US women admitted in San Diego Federal Court to being part of a baby-selling ring in which US surrogates reportedly went to the Ukraine to be implanted with anonymous donor embryos, then placed the resulting infants for adoption with a dozen American couples who each paid USD 150,000 (surrogates were paid USD 38,000-45,000). According to an Associated Press story by Julie Watson in 2012, 'Surrogacy Scandal Raises Question about Regulation,' a California reproductive law specialist pleaded guilty to conspiracy to commit wire fraud and was ordered to pay the couples restitution and government fines. The two other women pleading guilty to charges were a Maryland attorney and a Las Vegas surrogate who helped to recruit others.⁶⁶⁸

It must be recalled that the children born as a result of inter-country surrogacy arrangements are not the only vulnerable parties. The vulnerability of surrogates, particu-

663 See the concerns raised with respect to Guatemala: L. Tecu and E. Lamm, 'National Report on Guatemala' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 10.

664 700 A. 2d 453 (Pennsylvania).

665 See 'Taiwan Company Accused of Trafficking Vietnamese Women to Breed' available at: <<http://mobile.globalpost.com/dispatch/news/regions/asia-pacific/thailand/110310/thailand-surrogacy-human-trafficking>>; <www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnam-women-breed/?page=all>.

666 UN Human Rights Council (A/HRC/20/18/Add.2), 2 May 2012, available at: <www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-18-Add2_en.pdf>.

667 This was reported in Guatemala, where the system of birth registration is haphazard and insufficiently regulated – a problem that also raises difficulties concerning inter-country adoptions (J. Tecu and E. Lamm, 'National Report on Surrogacy: Guatemala' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 10, 167-8).

668 See 'Surrogacy Scam Played on Emotions of Vulnerable Victims', US Fed. Bureau of Investigation, available at: <www.fbi.gov/news/stories/2011/september/surrogacy_091311/surrogacy_091311>.

larly those from economically disadvantaged backgrounds, as well as of intending parents, often desperate in their search for a way to have a child, and gamete providers, suggests that there is also an imperative to prevent the exploitation of all parties to such arrangements.⁶⁶⁹ According legal recognition to a male genetic parent if the surrogate is unmarried may create demand driven pressures for surrogates to be single or divorced. This is of concern. Single and divorced surrogates are less likely to have emotional and financial support avenues available to them.

Despite the very real concerns of abuses identified in this study and elsewhere, there are few known accounts of convictions although there has been at least one reported conviction in Belgium and the Netherlands.⁶⁷⁰ The Hague Conference has reported a case in Ontario, Canada, where federal charges were brought under the Assisted Human Reproduction Act in February 2013. A company and its owner face 19 charges including charges relating to accepting payment for arranging the services of a surrogate, the purchase of ova from a donor, and payment to a woman to become a surrogate.⁶⁷¹ In broad terms, the perceived lack of prosecution suggests that states may not be aware of the risks or have the means to efficiently sanction and/or prosecute improper financial or other gain in surrogacy arrangements. The laws (if enacted) may also be too narrow because they do not sanction all types of violations or all actors involved. It should be questioned whether sanctions are often too low to have a truly dissuasive impact on offenders. Given the cross-border nature of these arrangements, laws may have a limited reach because it may be difficult for persons to prove a violation. States may also not have the necessary resources to investigate claims and prosecute offenders, which can be complicated and costly because the abuses are carried out in various states. Without cooperation between states, investigations can be difficult.

3.17 WHERE DOES THAT LEAVE US?

Global surrogacy arrangements are complicated. They often involve people from uneven and different backgrounds in a highly intimate yet usually commercial relationship. There may also be other players involved including egg donors and/or sperm donors. The extent of the practice of inter-country surrogacy remains largely unknown, and for most states, the absence of a regulatory framework appears to leave national courts and national

⁶⁶⁹ See '23/08/2011 – Alarms are being raised by governments as there is currently no specific policy to deal with the issue, and the international community finds itself racing to keep up with a practice that could be a catalyst for child abuse and trafficking', available at: <www.soschildrensvillages.ca/news/news/child-protection-news/child-trafficking-news/pages/dangerous-business-transactions-creating-babies-across-borders-020.aspx>.

⁶⁷⁰ See 3.6 and 3.7.

⁶⁷¹ As referenced in the HCCH 2014 Study at 94.

authorities struggling to devise the means of protecting the parties to surrogacy arrangements (not least if something goes wrong). Courts often employ case-by-case adjudication in these broad policy areas when they find statutory silence regarding the interests of children and responsibilities of adults in such parenting arrangements. This often leads to uncertainty for the surrogate-born child: uncertainty in terms of who are the child's legal parents (and who has parental responsibility with respect to the child), uncertainty over the child's nationality and immigration status, and uncertainty over the child's civil status. A clear contributing factor to these uncertainties is that surrogacy arrangements result in family formations that deviate from those that have been recognised and regulated by domestic law. The family created through surrogacy does not, in most states, fit easily into the existing legislative framework. The creation of a legal relationship with both intending parents affects not only the mutual connection of parent and child but also the associations between the child and the parents' families.

A real source of worry is the number of intending parents who choose to stay under the radar and who do not seek to regularise the status of the child. This can have real practical and harmful consequences. The cases where things go wrong, where intending parents later separate, or one of the intending parents dies can result in a court process being powerless to prevent children being disinherited, left disenfranchised from child maintenance or becoming wards of state, and such cases are undoubtedly on the horizon.⁶⁷²

In addition to the legal issues (surrounding the determination of parenthood and nationality), a growing rights-based concern – often phrased in the context of the best interests of the child – can be observed. Irrespective of a state's position on inter-country surrogacy, states are subject to international undertakings concerning, *inter alia*, the protection of human rights. As the review demonstrates, European national systems are porous to the influence of the ECHR and the case law of the ECtHR as well as the CRC. While some references to the concerns of trafficking and commodification are raised, these are usually wrapped up in public policy-type comments. The welfare has proven to be equally relevant in the context of a PIL analysis and considering the application of the public policy exception (to be applied at the time a determination is to be made and not at the time the facts occurred⁶⁷³) or the *fraude à la loi* mechanism. There is, therefore, a children's rights and women's rights imperative to work concerning surrogacy.⁶⁷⁴

There is a resounding need for open debate and international collaboration. The way to address the realities and the risk areas is by addressing them directly and with the degree

672 English solicitor and fertility law specialist N. Gamble has also raised this concern (see <www.nataliegamble-associates.co.uk/>).

673 See the discussion in the context of temporal relativity of public policy (*relativité de l'ordre public* or *zeitliche Relativität*) at 3.2.4.

674 The HCCH also arrives at this conclusion in its 2014 study, 'The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project', Prel. Doc. No 3 B of April 2014, para. 19.

of reflection and careful analysis that family issues call for. The prioritisation of the child's best interests including the child's rights to private and family life, identity, and a nationality are, of course, standards at the heart of the human rights project. With this in mind, attention now turns to consider the relevant international instruments and the existing human rights standards in order to determine to what extent they are relevant to and inform the debate in framing a child-centred approach to surrogacy.

4 CHILDREN'S RIGHTS IN INTER-COUNTRY SURROGACY

4.1 INTRODUCTORY REMARKS

Given the complexity of the legal issues involved, the number of reported cases and developing research literature attest to the topicality of surrogacy. As discussed in Chapter Three, the comparative legislative landscape is varied: it has been observed that surrogacy ranges from being legal and specifically regulated to illegal or unregulated or, in the majority of cases, somewhere between these two extremes. Against the background of the comparative review, two fundamental issues emerge:¹ the nature of parenthood and the distinction between what can and what ought not to be made an object of a private arrangement without judicial or state sanction. In the discourse of human rights law,² these issues resonate *inter alia* with norms regarding the non-commercialisation of the human body; the sale of children; the rights and freedom of women from exploitation and the right to health, liberty, and security of person; reproductive rights; the rights of children to see decisions concerning them be guided by their best interests; the rights of the child including the right to health, the right to a nationality, and the right to an identity and to information about one's origins; the right to a family; and perhaps also the rights of adults to form a family free from discrimination, protected from unjustified state interference in their privacy and their homes.³

It was also discussed in Part Two of Chapter Three that at each step of the surrogacy process, the potential for risks of abuse loom large. In addition to these risks are concerns over sex selection and genetic engineering.⁴ The exploitation of human beings for purposes of organ transplantation is also linked to other commodification practices, such as surrogacy, which hold special dangers for the rights and dignity of the world's poorest and most

1 See Chapter Three. See Y. Ergas, 'Thinking "Through" Human Rights: the Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 27, 427.

2 *Ibid.*

3 *Ibid.*

4 Crucial, however, is the question as to the extent to which genetic manipulations are justifiable under present international human rights law and, moreover, the extent to which they are ethically acceptable.

vulnerable, and to broader questions of justice and rights that arise in the context of reproductive travel.⁵

While there is a complete void in the international regulation of surrogacy arrangements, human rights norms (at times codified in a treaty) come into play, either by legitimating individual claims, such as that to the right to family life, the right to know one's origins, or the highest attainable standard of physical and mental health,⁶ or by setting obligations upon states to prevent, prosecute, and punish particular behaviours, including human trafficking⁷ and corruption.⁸

As this chapter will demonstrate, even in states which do not enshrine specific human rights in their national constitutions, binding international law, in a variety of forms, remains applicable in both monist⁹ and dualist¹⁰ states. International human rights law imposes duties upon states as to the treatment of those within their jurisdiction, which may imply a right to protection upon those individuals. Whether the obligations are enforceable in courts at a national level is a separate question, to be determined by domestic law. Another duty imposed is the binding international legal obligations that states must comply with in good faith.¹¹ Hence, the general protection of individuals and the family by the society and the state is recognised in international instruments, general,¹² regional,¹³ and international. As considered in Chapter Three, national law and domestic case law play an important role in translating European and international human rights law into the national context.

5 See conclusions of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, in accordance with Human Rights Council resolution 17/1. 'Report of the Special Rapporteur on trafficking in persons, especially women and children' A/68/256 (2 August 2013) at para. 21.

6 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, at. 12.

7 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/45/49 (15 November 2000).

8 Convention against Corruption, G.A. Res. 58/4, Articles 15-16, U.N. Doc. A/58/4 (31 October 2003), reprinted in 43 I.L.M. 37 (2004).

9 In states with a monist system (e.g. the Netherlands) international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates that international law into national law. See, e.g. I. Brownlie, *Principles of Public International Law* (7th ed. OUP, Oxford 2008) 31-33.

10 In dualist states (e.g. the UK), a treaty ratified by the government does not alter the laws of the state unless and until it is incorporated into national law by legislation. This is a constitutional requirement: until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the government or a private individual.

11 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Art 26 states that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.

12 ICCPR, Article 23(1); ICESCR, Article 10(1); and CERD, Article 5(b).

13 American Declaration of the Rights and Duties of Man 1948, Article VI; ADHR, Article 17; ACHPR, Article 18(1) and (2); and Arab Charter on Human Rights, Article 33(2).

Since the tenth century, it has been recognised that limping relations, especially when it concerns the personal status of individuals, should be avoided. Therefore, at the international level, various initiatives have been developed to come up with solutions in the form of conventions and treaties that regulate conflicts of private law. At a global level, the Hague Conference on Private International Law has been established with the aim to work for the progressive unification of the rules on private international law. But also at regional levels, different organisations are concerned with this issue. In Europe, notably the International Commission on Civil Status is concerned with the international cooperation in civil status matters and also the European Union is steadily entering the field of family law. Equally, there is growing case law that identifies a significant application of human rights law with regard to surrogacy (as discussed in Chapter Three). This phenomenon can be observed principally in the context of the European Convention on Human Rights (ECHR) (and a review by the European Court of Human Rights) and the Convention on the Rights of the Child (CRC) in domestic courts.

The treatment of surrogate-born children, the surrogate, the intending parents, and gamete providers raises clear human rights issues. The findings in Chapter Three illustrate that the practice of surrogacy implicates a number of rights issues, principally: the best interests of the child; a child's right to information about his or her origins; the need for continuity in a personal status to avoid limping family relations; and the informed and free consent of the surrogate and the parties to the surrogacy arrangement. The aim of this chapter is to examine the influence of international human rights law on civil status in general and parentage in particular.¹⁴ It is therefore necessary to first examine the existing principles and, only then, determine whether, and if so in what way, additional standards may be necessary, bearing in mind that these should, to the greatest extent possible, be consistent with existing practice and law. This requires an analysis of the current treaty provisions, in order to assess whether they are sufficient and adequate in this regard.

This chapter seeks to determine how best to understand and to protect the rights of children and the surrogate in inter-country surrogacy by providing content to the standards and principles set out in international law. The objective is to engage in an analysis of the most relevant international instruments in order to provide a comprehensive overview of the current standards and principles. This chapter also examines any efforts which have been undertaken at a bilateral, regional, or international level either towards cross-border cooperation in this area or towards a harmonisation of PIL rules on parentage as well as child protection standards. An overview of the principal human rights standards of particular significance to children is set out at Appendix 1 and to women at Appendix 2.

Reference is made in this chapter to the main instruments applying to regional systems of enforcement of human rights (the European, the Inter-American, the Arab, and the

¹⁴ A child's right to a nationality is considered in Chapter Five.

African system), although particular reference is given to the European Convention on Human Rights, and the European Court of Human Rights as this is the first supranational court that has considered instances of surrogacy.¹⁵ The relevant international instruments to a discussion on surrogacy are discussed in order to identify what standards emerge at the international level. The instruments are considered in the order of their regional application, starting with the instruments of the United Nations¹⁶ and then those of the Hague Conference on Private International Law, the Council of Europe, and, finally, the instruments of the European Union. Nonbinding instruments such as the work of the Commission on European Family Law are also discussed. Where applicable, each instrument's provisions on (1) the child's rights, (2) the parent-child relationship, and (3) its relevance to surrogacy are discussed. The fact that not each of the research states (of the 47 states across Europe) is party to each of the conventions and instruments being considered does not detract from their relevance in developing a framework for the protection of children in inter-country surrogacy. Whether they have been ratified by the state in question or not, these instruments remain an important indicator of the current international approach on relevant issues for surrogate-born children and are a reference point for further inquiry.

4.2 SOURCES OF INTERNATIONAL LAW

International law is the body of rules and principles that governs the relations and dealings between states. Broadly, international law imposes specific obligations on states and grants them specific rights and responsibilities. In some instances, international law has developed to cover relations between states and individuals, for example, in international human rights law. It is reported by the Office of the United Nations High Commissioner for Human Rights that all states in the world have ratified at least one human rights treaty and 80% have ratified at least four.¹⁷ When governments ratify international human rights treaties, they are legally bound to ensure that their national laws, policies, and practices do not conflict, and are consistent, with their obligations under international law.¹⁸

15 See the discussion at 4.12 and, in particular, the discussion with respect to the *Mennesson and Labassee* judgments.

16 The activities of the United Nations organs, such as the UN Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social, and Cultural Rights, will be cited in the following section as they provide further interpretation of the provisions contained in the corresponding instruments.

17 See 'What are human rights?' in Office of the High Commissioner for Human Rights [website]. United Nations; 2013, available at: <www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

18 Article 7 Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

In the field of international children's rights and women's rights, there are a select number of international human rights instruments, which have concentrated mainly on broad human rights standards. The instruments discussed come in various forms: treaties, protocols, general comments, and recommendations. On the basis that an international framework is required to respond to inter-country surrogacy, the choice of instrument, the forum of negotiating an agreement of the instrument, and the scope of the instrument (binding versus non-binding) are all important aspects.

A treaty is an agreement, between two or more states, that creates binding rights and obligations in international law. Treaties can be universal (open to as many states as want to join) or restricted to a smaller group of two or more states (for example, those in a particular geographical region). A treaty may be called by different names, such as 'convention', 'covenant', or 'protocol'. The terminology varies, but the substance is the same: they all denote a '*merger of wills of two or more international subjects for the purpose of regulating their interests by international rules*'.¹⁹ The obligations contained in a treaty are based on consent.²⁰ By becoming party to a treaty, states undertake binding obligations in international law. States are bound because they agree to be bound.²¹ States that have agreed to be bound by a treaty are known as 'States Parties' to the treaty. A state becomes a party to a treaty through a process of ratification or accession. States may often sign a treaty before this happens formally in order to signal their intention to be bound in the future.²² It is usually for States Parties to take into account in domestic law the necessary measures to give effect to the provisions of a treaty. Conformity between a treaty and domestic law may be achieved either by applying directly the treaty's provisions in domestic law or by enacting the necessary legislation to give effect to them domestically. It should be noted that a treaty may contain a number of provisions which may, under the domestic law of many states, qualify as directly applicable (often known as self-executing provisions). This is the case, particularly, with provisions formulating individual rights. Other provisions contain more general principles which may require the enactment of legislation in order that effect is given to them in domestic law.

Standards are defined as internationally negotiated or endorsed human rights documents (or instruments), whether these are binding or not.²³ Binding documents create or, at times, codify legal obligations or duties (known as 'hard law'), while non-binding documents

19 A. Cassese, *International Law* (Oxford University Press 2001) 126.

20 Although some provisions of international treaties have become customary law (discussed below).

21 States may sign, but never ratify, a document.

22 These definitions are adapted from *The Concise Oxford Dictionary of Current English* (8th edition, Clarendon Press Oxford 1990) and United Nations Treaty Collection, Treaty Reference Guide 1999, available at: <<http://untreaty.un.org/English/guide.asp>>. See also the UN Treaty Collection's description at: <http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml>.

23 See International Council on Human Rights Policy, 'Human Rights Standards: Learning from Experience' [2006] available at: <www.ichrp.org/files/reports/31/120b_report_en.pdf>.

make recommendations (known as 'soft law'). The former is composed of conventions, covenants, and protocols that are binding on states, which have ratified, accepted, or acceded to them. Hard law instruments often require years of negotiation and emerging consensus with respect to the subject-matter.

There are also a number of differences between the intent behind and aims of soft law instruments compared with hard law instruments. The first difference is that the binding instruments tend to contain general ideas and broad notions such as the protection of the family (including the protection of the relationship between the parent and the child),²⁴ the best interests of the child, the right of the child to know and be cared for by both parents, and the right of the child to be heard in proceedings concerning him or her. Although it should be noted that more recent treaties on specific subject matters tend to be more ambitious and therefore more detailed.²⁵ The non-binding instruments usually contain more specific rules, such as detailed prescriptions on the circumstances in which a parent can be deprived of parental responsibilities. Similarly, binding instruments tend to be more 'general', meaning that their provisions usually contain concepts on which there is already a degree of consensus among the States Parties. Non-binding instruments are usually more progressive, in that they usually introduce new notions and terminology. As an example, one can take the introduction and definition of parental responsibilities in the 1984 Recommendation on Parental Responsibilities.²⁶

Human rights treaties are often followed by 'optional protocols', which usually complement the treaty. A protocol may be on any topic relevant to the original treaty or add a procedure for the enforcement of the treaty, such as adding an individual complaint or communications procedure. Generally, only states that are already bound by an original treaty may ratify its optional protocols, but there are notable exceptions to this. The optional protocols to the Convention on the Rights of the Child do permit non-States Parties to ratify or accede to them. For example, the USA, which has not ratified the CRC, has signed and ratified two of the optional protocols to the CRC, the Optional Protocol on the

24 The family is entitled to special protection under a number of international standards. Article 16 UDHR establishes that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Article 23 ICCPR sets out protection for the family, for example, the right of men and women to found a family, as well as protection for children in the case of dissolution of marriage. Article 10 ICESCR, Article 17 ACHR, Article 15 Protocol of San Salvador, Article 12 ECHR, as well as Articles 16, 17 and 19 ESC deal with rights of the family. Article 18 ACHPR attaches particular importance to the state's duty to protect the family as the 'natural unit and basis of society, a custodian of morals and traditional values'.

25 The Istanbul Convention on Violence against Women being a case in point. This Council of Europe Convention is available at: <www.coe.int/conventionviolence>. The Istanbul Convention builds on the three sources that constitute the CEDAW framework: the Convention, General Recommendations and case law. The Convention is open for accession by states which are not Council of Europe members. Even more recent UN treaties tend to be more detailed such as the UN Convention on the Rights of Persons with Disabilities, 13 December 2006 available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-15&chapter=4&lang=en>.

26 COE 1984. Recommendation (84)4 on Parental Responsibilities.

Involvement of Children in Armed Conflict, and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography. In theory, certain gaps in protection might be resolved by amending the original text of a relevant treaty as opposed to the adoption of a protocol. However, it is accepted that it is likely any amendment to the existing text of a treaty may prove to be complicated without significant (and identifiable) consensus.²⁷

The second group of instruments includes declarations, recommendations, principles, and guidelines. These documents are, by their nature, not usually legally binding because states have not formally agreed to be bound by the provisions they contain.²⁸ Because these instruments are not binding, they are sometimes easier to negotiate and adopt. Declarations and other 'soft law' documents offer usually a more flexible instrument in which to develop a norm, raise awareness and assist states with meeting their international obligations. An instrument can provide political and legal authority.²⁹ There are other reasons to consider soft law instruments. Sometimes these instruments prepare the way for a binding document, particularly in areas that are considered to be politically sensitive; but this too is a difficult matter to predict. Sometimes they raise awareness and provide states with practical guidance. Some soft law instruments have become points of reference – referred to in national legislation, national, regional and international jurisprudence, or in other international instruments.³⁰ The Yogyakarta Principles,³¹ for example, outline a set of international principles relating to sexual orientation and gender identity. UN treaty monitoring bodies have also begun the practice of preparing General Comments or Recommendations on the provisions of their respective treaties and, more broadly, to address particular human rights or humanitarian issues.³² The General Comments or Recommendations are useful tools to clarify the normative content of treaties because they are broad in nature and

27 For more, see International Council on Human Rights Policy, 'Human Rights Standards: Learning from Experience' [2006] available at: <www.ichrp.org/files/reports/31/120b_report_en.pdf>.

28 *Ibid.*, 11.

29 An example is the Siracusa Principles. A group of 31 experts in international law, convened by the International Commission of Jurists, the International Association of Penal law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Sicily, for a week in spring 1984 to consider the limitation and derogation provisions of the International Covenant on Civil and Political Rights. The participants were agreed upon the need for a close examination of the conditions and grounds for permissible limitations and derogations enunciated in the Covenant in order to achieve and effectively implement the rule of law. As frequently emphasised by the General Assembly of the United Nations, a uniform interpretation of limitations on the rights in the Covenant is of great importance. The text of the principles is available at: <www1.umn.edu/humanrts/instree/siracusaprinciples.html>.

30 E.g. the UNHCR Recommended Principles and Guidelines on Human Rights and Human Trafficking and Commentary (HR/PUB/10/2).

31 Available at: <www.yogyakartaprinciples.org>.

32 E.g. the UNHCR Recommended Principles and Guidelines on Human Rights and Human Trafficking and Commentary (HR/PUB/10/2).

provide an abstract picture of the scope of the obligations; they enable the Committees to provide their interpretations of the different provisions of the treaties.

It is interesting to note that while binding and non-binding instruments are both intended to apply to states, the non-binding instruments discussed in this chapter focus more on children's rights rather than on rights of the parents. They are drafted to ensure that the child's best interests are considered. It is therefore clear that the choice of instrument or instruments is important. It would seem to be difficult to assess in advance which kind of instrument will be better mooted for the purposes of negotiation and gaining consensus and, ultimately, more effective in responding to the multiple issues raised by inter-country surrogacy. While a 'hard law' binding response is preferable, the options that 'soft law' offers in conjunction with domestic action should not be underestimated.

4.3 INTERNATIONAL AND REGIONAL HUMAN RIGHTS REGIMES

The UN Charter³³ was signed on 26 June 1945 by the representatives of 50 states, making international concern for human rights an established part of international law. The Universal Declaration of Human Rights (UDHR), a declaration adopted by the UN General Assembly,³⁴ was the first global expression of rights to which all human beings are inherently entitled. The principal UN human rights treaties are the two covenants (the International Covenant on Economic, Social, and Cultural Rights (ICESCR)³⁵ and the International Covenant on Civil and Political Rights (ICCPR)³⁶) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),³⁷ the Convention on the

33 Available at: <www.un.org/en/documents/charter/>.

34 On 10 December 1948 at the Palais de Chaillot, Paris, France.

35 The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966. It entered into force 3 January 1976. There are 160 States Parties (which include the research jurisdictions considered in this thesis). See ratification status table at: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en>.

36 The International Covenant on Civil and Political Rights (ICCPR) was adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966. It entered into force 23 March 1976. There are 167 States Parties (which include the research jurisdictions considered in this thesis). See ratification status table at: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en>.

37 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted by UNGA Resolution 2106 A (XX) of 21 December 1965. It entered into force on 4 January 1969. There are 176 States Parties (which include the research jurisdictions considered in this thesis). See ratification status table at: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en>.

Elimination of All forms of Discrimination against Women (CEDAW),³⁸ the Convention Against Torture (CAT),³⁹ and the CRC.⁴⁰

The Human Rights Council is the principal UN intergovernmental body responsible for human rights. It was established by UNGA Resolution 60/251 on 15 March 2006 as successor to the UN Commission on Human Rights. One of the innovative features introduced by Resolution 60/251 is the universal periodic review process (UPR).⁴¹ This is a human rights mechanism through which the Human Rights Council periodically reviews the fulfilment by each of the UN States Parties of their human rights obligations and commitments. Under the UPR, the human rights records of all UN States is reviewed by the Council on an ongoing, regular basis.

The UDHR sets out universal human rights conferred upon 'everyone', whereas others such as freedom of movement, political rights, and access to public office are reserved to citizens. At the time of its adoption, it was unanimously agreed that the UDHR would not impose legal obligations on states.⁴² In addition, it was adopted as a resolution of the General Assembly, which does not automatically have the force of international law. However, it has become the source of international legal obligations as it has been accepted as a norm or at least significant evidence of customary international law.⁴³ It is said that the UDHR '*constitutes an authoritative interpretation of the [UN] Charter of the highest order, and has over the years become part of customary international law*'.⁴⁴ The multiple activities of international institutions build understanding and expectations regarding human rights norms and they can also be seen as contributing to the formation of customary international law.

38 The Convention on the Elimination of All forms of Discrimination against Women was adopted by UNGA Resolution 34/180 of 18 December 1979. It entered into force 3 September 1981. There are 187 States Parties (which include the research jurisdictions considered in this thesis except the USA), many with a considerable number of reservations that have significantly undermined the effectiveness of the convention.

39 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by UNGA Resolution 39/46 of 10 December 1984. It entered into force 26 June 1987.

40 The Convention on the Rights of the Child was adopted by UNGA Resolution 44/25 on 20 November 1989. It entered into force on 20 September 1990. This treaty is currently the human rights treaty with the most parties.

41 For a summary overview, see <www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx>.

42 E. Roosevelt, Chairman of the UN Commission on Human Rights during the drafting of the Declaration, stated on the character of the document: 'It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its Members, and to serve as a common standard of achievement for all peoples of all nations', quoted in H. Hannum, 'The Status of the UDHR in National and International Law' [1995-1996] 25 *The Georgia Journal of International and Comparative Law* 318.

43 H. Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention' in the *European Convention of Human Rights* [1965] 15 *British Institute of International and Comparative Law Series No. 5*.

44 Montreal Statement of the [Nongovernmental] Assembly for Human Rights [1968], reprinted in 9 *International Commission of Jurist's Law Review* 94.

An examination of the human rights and international law principles as they are relevant to surrogacy would be incomplete without a brief reference to the evolving understanding of the duties that fall to states and the entitlements of the rights holder. Reference has already been made to those wide-ranging aspects of the human rights obligations that have been charted by the UN Special Procedures.⁴⁵ Of more immediate normative significance are those recent General Comments of the UN human rights treaty bodies⁴⁶ that have emphasised that states are obliged to undertake, for example, effective programmes of education and public awareness about human rights and must otherwise seek to enable people to fully enjoy their entitlements.

Protecting children's and women's rights is a central aim of international human rights law.⁴⁷ The right of all to equal protection of the law, without any discrimination, is recognised generally in UDHR,⁴⁸ ICCPR,⁴⁹ and CEDAW.⁵⁰ This right is also proclaimed regionally in the American Convention on Human Rights (ACHR),⁵¹ the African Charter on Human and Peoples' Rights,⁵² and the Arab Charter on Human Rights.⁵³ The right to judicial protection is conferred upon everyone within the jurisdiction of the States Parties

45 The special procedures cited most commonly in this thesis are: the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on torture; and the Special Rapporteur on the sale of children, child prostitution, and child pornography.

46 Human Rights Committee, General Comment No. 31: Nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004; Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties obligations, E/1991/23, 14 December 1990; Committee on Economic, Social, and Cultural Rights, General Comment No. 9: The domestic application of the Covenant, E/C.12/1998/24, 3 December 1998; and Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, CRC/ GC/2003/5, 27 November 2003.

47 This overview includes only a discussion of those key international and regional instruments that are relevant to the topic of surrogacy. While potentially related to issues of surrogacy, instruments on child abduction have deliberately been excluded from the paper. Even though child abduction can coincide with co-parenting (for example, when a co-parent abducts the child to another country), it is a large and complex subject that touches not only upon private international law but also on elements of criminal law and public law.

48 Article 28 UDHR provides that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' The consequence of this article is that states must both themselves respect human rights and ensure compliance with human rights by non-state actors, in accordance with the duty of due diligence.

49 Article 26 and Articles 5(b) and 6.

50 Article 2(c).

51 Article 24.

52 Articles 3(1) and 2.

53 Article 11.

in CERD,⁵⁴ CEDAW,⁵⁵ and regionally in the ACHR,⁵⁶ the African Charter on Human and Peoples' Rights,⁵⁷ and the Arab Charter on Human Rights.⁵⁸

While most states recognise that children enjoy rights in their own name, they also recognise that children are uniquely vulnerable and that the family unit is often crucial to a child's security, happiness, and to the protection of their rights. A plethora of international and national laws aim to protect families as a means of ensuring that children are raised in a stable and loving environment. Consequently, the extent to which a child's family unit enjoys legal recognition has a considerable impact on that child's enjoyment of his or her rights. Children have therefore received special protection internationally. General instruments such as the UDHR,⁵⁹ ICCPR,⁶⁰ ICESCR,⁶¹ and particularly the CRC build upon the idea that *'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'*.⁶² Regional instruments providing special protection to children include the 1948 American Declaration of the Rights and Duties of Man,⁶³ the 1969 ACHR,⁶⁴ the 1999 African Charter on the Rights and Welfare of the Child,⁶⁵ and the 2004 Arab Charter on Human Rights.⁶⁶

The ability of individuals to complain about the violation of their rights in an international arena enforces the meaning of the rights contained in the human rights treaties.⁶⁷ There are three main procedures for bringing complaints before the human rights treaty bodies: (1) individual communications, (2) state-to-state complaints, and (3) inquiries. There are also procedures for complaints which fall outside of the treaty body system – through the Special Procedures of the Human Rights Council and the Human Rights Council Complaint Procedure.

As mentioned above, there are a number of core international human rights treaties. Each of these treaties has established a 'treaty body' (Committee) of experts to monitor implementation of the treaty provisions by its States Parties. Treaty bodies (CCPR, CERD, CAT, CEDAW, CRPD, CED, CMW, CESC, and CRC) may, under certain conditions, consider individual complaints or communications from individuals. Currently, some of

54 Article 6.

55 Article 2(c).

56 Article 25.

57 Article 7.

58 Article 12.

59 Article 25(2).

60 Article 24(1).

61 Article 10(3).

62 See Preamble to the CRC.

63 Article VII.

64 Article 19.

65 Article 18(3).

66 Article 33(3).

67 See 'Complaining about human rights violations' available at: <www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>.

the human rights treaty bodies (CRC, CCPR, CERD, CAT, CEDAW, CRPD, CED, and CESCR) may, under certain conditions, receive and consider individual complaints or communications from individuals. Examples discussed in this chapter include: the Human Rights Committee may consider individual communications alleging violations of the rights set forth in the International Covenant on Civil and Political Rights by States Parties to the First Optional Protocol to the International Covenant on Civil and Political Rights and the Committee on Elimination of Discrimination against Women may consider individual communications alleging violations of the CEDAW Convention by States Parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

Anyone can lodge a complaint with a Committee against a State Party: (1) that is, party to the treaty in question (through ratification or accession) providing for the rights which have allegedly been violated and (2) that accepted the Committee's competence to examine individual complaints, either through ratification or accession to an Optional Protocol (in the case of, e.g. ICCPR, CEDAW, CRPD, ICESCR, and CRC) or by making a declaration to that effect under a specific article of the Convention (in the case, e.g. of CERD, CAT, and CMW).⁶⁸ Complaints may also be brought by third parties on behalf of individuals, provided they have given their written consent (without requirement as to its specific form). In certain cases, a third party may bring a case without such consent, for example, where a person is in prison without access to the outside world or is a victim of an enforced disappearance. In such cases, the author of the complaint should state clearly why such consent cannot be provided.

Several of the human rights treaties contain provisions to allow for States Parties to complain to the relevant treaty body (Committee) about alleged violations of the treaty by another State Party although to date, none of these procedures have ever been used. For example, Article 12 of the Optional Protocol on a Communications Procedure to the CRC sets out a procedure for the relevant Committee itself to consider complaints from one State Party which considers that another State Party is not giving effect to the provisions of the CRC. This procedure applies only to States Parties who have made a declaration accepting the competence of the Committee in this regard.

Upon receipt of reliable information on serious, grave, or systematic violations by a State Party of the conventions they monitor (e.g. the CEDAW Committee (Article 8 of the Optional Protocol to CEDAW) and the Committee on the Rights of the Child (Article 13 of the Optional Protocol on a Communications Procedure to CRC)), a committee may, on its own initiative, initiate inquiries if it has received reliable information containing well-founded indications of serious or systematic violations of the convention in a State Party. Inquiries may only be conducted with respect to States Parties that have recognised

⁶⁸ *Ibid.*

the competence of the relevant committee in this regard. States Parties may opt out from the inquiry procedure, at the time of signature or ratification or accession or anytime by making a declaration that they do not recognise the competence of the committee in question to conduct inquiries.

There are broadly three regional human rights systems with a functioning supranational court system in Europe, the Americas, and Africa.⁶⁹ The purposes of the following overview are (a) to provide a historical background and (b) to give a brief account of the relevant provisions and standards relating to the family/the child in the context of this thesis.

4.3.1 *Europe*

Europe's architecture of human rights protection has been described as a '*crowded house*'.⁷⁰ Citizens and judicial authorities are confronted with different legally binding texts to be applied, at times, simultaneously, partly with different processes and terminologies. The protection includes: (a) the domestic law, including in most cases the national constitution's fundamental rights catalogue; (b) the ECHR and its protocols; (c) EU law, in particular the Charter of Fundamental Rights of the European Union;⁷¹ and (d) international human rights instruments. What makes the situation particularly complex is the fact that the different, often overlapping, legal sources will have to be combined.

The European system for the protection of human rights was established by the Council of Europe, a regional intergovernmental organisation. In 1949, the Parliamentary Assembly of the Council of Europe approved the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed on 4 November 1950 and entered into force on 3 September 1953.⁷² All Council of Europe Member States are parties to the ECHR (or, 'Contracting States').

In the history of European integration, two Europe's have developed at differing speeds, each with a different purpose, a different structure, and a different number of participants. The overlapping of the two regimes in this regard is clearly manifested in two different legal institutions: the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The former, which belongs to the Strasbourg-based Council of Europe, safeguards human rights in Europe. Its duty is to monitor the imple-

69 There are, however, other regional arrangements for the protection of human rights. For example, within the framework of the League of Arab States (founded in 1945), there is a Permanent Arab Commission on Human Rights that has adopted the Arab Charter on Human Rights and the ASEAN Commission on Human Rights.

70 C. Villalón, 'Rights in Europe – The Crowded House', King's College London, Working Paper January 2012.

71 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal 2007/C 306/01.

72 The relevance of the ECHR in the context of surrogacy is considered at 4.11.

mentation of these safeguards under the ECHR, with a jurisdiction that primarily includes questions relating to the national laws of Council of Europe Contracting States. In contrast, the CJEU, based in Luxembourg, is not a human rights court. Instead, it is the highest court established by the European Union. Its judicial mandate is to deal with any issues relating to the interpretation and application of EU law or national law that derives from EU law.⁷³ This jurisdiction includes the fundamental freedoms and human rights within that EU law. In an EU human rights context, it should be noted that the Charter of Fundamental Rights of the European Union was signed and proclaimed in 2000.⁷⁴

EU Member States are subject to three distinct regional layers of human rights protections in addition to their international human rights obligations: their own human rights law, the EU Charter of Fundamental Rights and the ECHR. The systems for the protection of human rights both in the EU and in the Council of Europe recognise that states may vary in the standards they use for the enhancement and protection of human rights, and, as discussed below in the context of the EU and the Council of Europe, states may have a margin of appreciation when it comes to interpreting and applying the provisions of EU and the ECHR.⁷⁵

4.3.2 *The Americas*

In the Americas, the Organization of American States (OAS) is a regional intergovernmental organisation as defined by Article 52 of the UN Charter. The OAS Charter was adopted at the Ninth International Conference of American States in 1948 and entered into force in 1951. It has been amended several times. The 1967 Protocol of Buenos Aires changed the structure of the organisation in several aspects and elevated the status of the Inter-American Commission on Human Rights to that of a 'principal organ' of the OAS. Various provisions of the OAS Charter refer to human rights but only in vague terms. Article 3(j) of the 1948 OAS Charter refers to the '*fundamental rights of the individual*' among the principles which the Charter promotes. While the OAS Charter does not list or define expressly the human rights it refers to, the Inter-American Court of Human Rights has

73 M. Wells-Greco, 'Citizenship and free movement rights: beyond economic links' in M. Horspool and M. Humphrey *EU Law* (8th ed. OUP: 2014).

74 With the coming into force of the Treaty of Lisbon (Lisbon Treaty) in December 2009, the EU Charter has become directly enforceable by the EU and national courts. Article 6(1) of the Treaty on the European Union (TEU) provides that 'the Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights'. There is no direct incorporation of the Charter in the Lisbon Treaty, but the Charter is given the same legal status. With regard to individual Member States, article 51 of the Charter makes it absolutely clear that the Charter only applies to Member States when they act within the scope of EU law – this usually means when they implement EU legislation domestically. The EU Charter is available at: <www.europarl.europa.eu/charter/default_en.htm>.

75 J. Polakiewicz, 'Fundamental Rights In Europe: A Matter for Two Courts' Lecture at Oxford Brookes University, 18 January 2013.

ruled that '[t]hese rights are none other than those enunciated and defined in the American Declaration'.⁷⁶

The Inter-American Court of Human Rights was established by the 1969 American Convention of Human Rights, concluded under the aegis of the OAS, with the task to ensure, along with the Inter-American Commission of Human Rights, the observance of the rights and freedoms protected thereunder.⁷⁷

Article 19 of the American Convention on Human Rights stresses that children have the right to special protection from the state, but it is not specific about what rights children are entitled to or how these should be upheld. Article 16 to the Additional Protocol to the American Convention adds that every child has the right to grow up under parental protection and may be separated from his or her mother (but, interestingly, not his/her father) only in exceptional circumstances.⁷⁸ The Additional Protocol also enshrines the right of every child to primary education (Article 13).

4.3.3 Africa

The African Union (AU) is a regional intergovernmental organisation that replaced the Organisation of African Unity (OAU). The three bodies most relevant to human rights protection under the African human rights system are the African Commission on Human and Peoples' Rights, the African Court of Human and Peoples' Rights (soon to be replaced by the African Court of Justice and Human Rights),⁷⁹ and the African Committee on the Rights and the Welfare of the Child.

The African Charter on the Rights and Welfare of the Child⁸⁰ (ACRWC) is an important tool for advancing children's rights. While building on the same basic principles as the CRC, the AU Children's Charter highlights issues of special importance in the African context. Article 4(1) ACRWC confirms that '*[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration*'. Article 6 ACRWC, titled 'Name and Nationality', provides in full that:

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.

⁷⁶ Advisory Opinion No. 10, OC-10/89, 14 July 1989, para. 41.

⁷⁷ Available at: <www.corteidh.or.cr/http://www.ejil.org/pdfs/19/1/175.pdf>.

⁷⁸ Available at: <www.oas.org/juridico/english/treaties/a-52.html>.

⁷⁹ See <www.african-court.org/>. The African Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights.

⁸⁰ As of January 2014, each of the member states of the AU has signed the Children's Charter and all save for seven have ratified it. The seven member states which have signed but not yet ratified the Charter are: Central African Republic, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, South Sudan, and Tunisia.

3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Article 20 ACRWC provides that '*parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child [...]*'.

Article 18 of the African Charter on Human and Peoples' Rights ('ACHPR') 1981 provides:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4.3.4 Arab states

The Arab Charter on Human Rights was adopted by the Council of the League of Arab States on 22 May 2004 and affirms most of the principles contained in the UN Charter, the UDHR, and the Cairo Declaration on Human Rights in Islam.⁸¹ A number of human rights are provided for, including the right to liberty and security of persons, equality of persons before the law, protection of persons from torture, the right to own private property, freedom to practice religious observance, and freedom of peaceful assembly and association. The Charter also provides for the election of a seven-person Committee of Experts on Human Rights to consider states' reports. The Charter was updated in 2004 and came into force in 2008 when seven of the members of the League of Arab States had ratified it.⁸²

81 League of Arab States, Arab Charter on Human Rights, 22 May 2004, reprinted in [2005] 12 International Human Rights. Rep. 893, entered into force on 15 March 2008. An English translation is *available* via the University of Minnesota's Human Rights Library at: <www1.umn.edu/humanrts/instree/loas2005.html?msource=UNWDEC19001&tr=y&auid=3337655>.

82 The Charter has been ratified by Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen.

Article 29⁸³ provides that:

1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.
2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.

Article 33⁸⁴ provides:

1. The family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.
2. The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development.
3. The States parties shall take all necessary legislative, administrative and judicial measures to guarantee the protection, survival, development and well-being of the child in an atmosphere of freedom and dignity and shall ensure, in all cases, that the child's best interests are the basic criterion for all measures taken in his regard, whether the child is at risk of delinquency or is a juvenile offender.

Reference should also be made to the Covenant on the Rights of the Child in Islam, in particular to Article 7, which confirms the rights of all children to an identity, a name, and a nationality and to know his/her parents and, where applicable, 'foster mother'.⁸⁵

83 An English translation is *available* via the University of Minnesota's Human Rights Library at: <www1.umn.edu/humanrts/instree/loas2005.html?msource=UNWDEC19001&tr=y&auid=3337655>.

84 *Ibid.*

85 Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Yemen, in June 2005. An English translation is *available* at: <www.icnl.org/research/monitor/oic.html>.

4.4 AN OVERVIEW OF THE RELEVANT INTERNATIONAL OBLIGATIONS

Against this background, the main point to be considered in this part is how the protection of respect for human rights influences the determination of parenthood and the rights of the child (excluding the right to a nationality, which is considered in Chapter Five) in the context of surrogacy as well as a state's obligations towards those parties involved in the surrogacy process (principally, the surrogate-born child). To consider which rights are implicated in surrogacy, it is first important to consider individual treaties and other international human rights instruments, followed by how the treaty bodies have interpreted the rights set out in these treaties. This section identifies and considers several rights that have either proven to be, or may prove to be, implicated when considering surrogacy from a children's rights perspective.

For the purposes of this review, searches of each of the individual treaty databases and monitoring systems (where publicly available) under the UN Human Rights Council and treaty monitoring bodies have been undertaken in order to analyse to what extent the topic (and issues related to surrogacy) is considered.⁸⁶

UNITED NATIONS

4.5 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The ICESCR is a multilateral treaty adopted by the UN General Assembly in 1966 which entered into force in 1976. It commits its parties to work towards the granting of economic, social, and cultural rights to individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living. The ICESCR is part of the International Bill of Human Rights, along with the International Covenant on Civil and Political Rights and the UDHR.

An Optional Protocol to the UN International Covenant on Economic, Social, and Cultural Rights (or, 'ICESCR Optional Protocol') entered into force on 5 May 2013.⁸⁷ The ICESCR Optional Protocol recognises the competence of the Committee on Economic, Social, and Cultural Rights to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, who claim to be victims of a violation of any of the economic, social, and cultural rights set forth in the covenant.

⁸⁶ This desktop review has been conducted via the OHCHR search engine; search term 'surrogacy'.

⁸⁷ Available at: <www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>.

4.5.1 *Child's rights and parent-child relationships*

The most relevant article in the context of this study is its Article 10, which recognises several rights of the family unit:

Article 10 The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. [...]
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

4.5.2 *Relevance to surrogacy*

States Parties to the ICESCR are therefore obliged to protect and assist children without discrimination. Protection and assistance should be accorded to the family, and special protection should be provided to mothers. Special measures should be taken on behalf of children, without discrimination. Children and youth should be protected from economic exploitation. All children within the territory of a State Party, including undocumented children, have the right to education, adequate food, and affordable healthcare. The rights enshrined in the ICESCR apply to everyone, including surrogate-born children, regardless of legal status and documentation.⁸⁸

Issues concerning access to assisted means of conception are intricately connected with issues of health and welfare for children and surrogate mothers in particular. Access to medical assistance (where desired) without fear of criminal sanction or stigma surrounding

⁸⁸ ICESCR, General Comment No. 20 (2009), 'Non-Discrimination in Economic, Social and Cultural Rights' (Article 2(2) ICESCR), E/C.12/GC/20, 2 July 2009, at 30.

the circumstances of a pregnancy should be an important consideration in any regulatory response to surrogacy.⁸⁹

The Committee on Economic, Social, and Cultural Rights, the monitoring body under the ICESCR, has not yet, in its consideration of individual cases, addressed surrogacy.⁹⁰

4.6 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR was the first international instrument to protect the rights of the family and the child. The ICCPR has generated a large body of case law that has branched out into issues concerning parentage and family contact. The three articles on which the most important case law (for this thesis) is based are Article 17 ICCPR on the protection of privacy, Article 23 ICCPR on the protection of the family, and Article 24 ICCPR on the protection of the child.

4.6.1 *The child's rights*

Article 17 ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with his or her privacy, family, home, or correspondence. Article 23 ICCPR proclaims the family as the natural and fundamental group unit of society, which is entitled to protection by society and the state. Article 24 ICCPR lays down the rights of a child to protection (by his or her family, society, and the state), a name, and a nationality.⁹¹ It is for each state to determine what measures might be needed for the protection of children in its territory and jurisdiction.⁹²

4.6.2 *Parent-child relationship*

The definition of family under the ICCPR is not confined to the concept of marriage and should be broadly interpreted; however, some minimum requirements for the existence of a family relationship are necessary, such as life together, economic ties, and a regular and intense relationship.⁹³

⁸⁹ Article 12 ICESCR.

⁹⁰ Although at least one State Party, New Zealand, has referred to surrogacy in its State Report, see E/C.12/NZL/3.

⁹¹ Article 24 ICCPR: '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality'.

⁹² Human Rights Committee, General Comment No. 17 (Thirty-fifth session, 1989), 7 April 1989, para. 3.

⁹³ S. Joseph *et al.* *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed. Oxford University Press 2004) 588.

Article 23 ICCPR protects the bond between parent and child from the point of view that the family should be protected and kept intact as far as possible, while Article 24 ICCPR is intended to ensure the protection and the best interests of the child. But '*in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the state should intervene to restrict parental authority and the child may be separated from his family when circumstances so require*'.⁹⁴

4.6.3 Relevance to surrogacy

The Human Rights Committee, the monitoring body under the ICCPR, has stated that Article 17 ICCPR requires an interpretation of the term 'family' to include '*all those comprising the family as understood in the society of the State party concerned*'.⁹⁵ While the relationship between the parent(s) and child is seen as a family bond and has to be protected by the state, the ICCPR does not prescribe rules to determine who is (or is not) a legal parent. Instead the ICCPR prescribes equality: this right arguably extends to children born through surrogacy, intending parents, and surrogate mothers. The right to be equal before the law is a fundamental human right which complements the best interests of children. For example, the right to equality before the law recognises that it is not in the best interests of children to be discriminated against by virtue of the marital status or sexual orientation of their parents.⁹⁶

The Human Rights Committee has not yet, in its consideration of individual cases, addressed surrogacy. Nevertheless, dicta of the Committee are relevant. According to the Human Rights Committee, '*the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances*'.⁹⁷ When assessing the reasonableness of any interference, two broad issues fall for consideration: whether the interference responded to a pressing social need or pursued a legitimate aim and whether the measures used to achieve that aim were proportionate or justified. An aim will be legitimate when its purpose is to secure the recognition and respect of the rights of others and/or to protect morality, public order, or the general welfare of a state. Measures will be deemed proportionate when there is a rational connection between the measure taken to achieve the aim (which generally requires evidence) and where no less restrictive measures are reasonably available to achieve the aim. As Tobin has written:

⁹⁴ *Ibid.*, para. 6.

⁹⁵ Human Rights Committee, General Comments No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17), 4 August 1988.

⁹⁶ ICCPR, Article 24(3).

⁹⁷ Human Rights Committee, General Comment 16: 'The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)', 32nd session (8 April 1988).

[T]his means that if the right to respect to privacy and family life encompasses a right to enter surrogacy arrangements, this right remains subject to a state's capacity (and potential obligation) to restrict this where it is reasonably necessary to (a) protect the rights of persons other than the intending parents and/or (b) protect public morality. This in turn requires states to consider competing rights and the broader theme of public morality in its response to international surrogacy.⁹⁸

4.7 CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child is the cornerstone instrument promoting children's rights at the international level.⁹⁹ The CRC was the first legally binding international instrument to incorporate the full range of human rights – civil, cultural, economic, political, and social rights.¹⁰⁰ It contains a set of rules and principles that guide States Parties to develop a comprehensive and coherent framework reflecting child-specific rights, acknowledging as a result that children have human rights too.¹⁰¹ The CRC requires States Parties to ensure that the best interests of children are the primary consideration in all actions that may affect them. When States Parties design and implement policies affecting children and their families, they must consider the children's best interests,¹⁰² take into account individual children's evolving capacities, and respect and ensure the inherent dignity of all children.

The CRC, which counts 195 States Parties,¹⁰³ establishes broad principles and norms. Its widespread ratification – by all UN members except the USA and South Sudan – suggests that there is a strong level of international consensus on the way children should be treated in a wide variety of areas and circumstances. In adopting the CRC, the international

98 See J. Tobin, 'To Prohibit or Permit: What is the (human) Rights Response to the Practice of International Commercial Surrogacy?' [2014] 63(2) *International and Comparative Law Quarterly*, 317-352, 325.

99 Children's rights have been subject to a series of cascading legal developments in the twentieth century that aimed at bringing children out of the shadows of 'historical diplomatic invisibility'; G. Van Bueren, *The International Law on the Rights of the Child* (Kluwer, Amsterdam, 1995). The 1924 Declaration of the Rights of the Child is the first international expression of rights owed to children although its language is couched in a welfarist rather than a rights discourse. In parallel with the post-Second World War developments in international human rights law, the 1959 Declaration of the Rights of the Child represented a paradigmatic shift in thinking about children's rights by adopting the language of entitlement. As the conceptual parent of the CRC, the Declaration paved the way for the initial Polish draft of the CRC in 1978 which was completed in 1989.

100 See G. van Bueren, *International Law on the Rights of the Child* (Kluwer, Amsterdam, 1998).

101 For more on the CRC, see UNICEF at <www.unicef.org/rightsite/>.

102 At least one commentator rejects the 'best interests of the child test' as inapplicable. See I. Glenn Cohen, 'Regulating Reproduction: The Problem with Best Interests' [2011] 96 *Minnesota Law Review* 423, 437-42.

103 See list of States Parties at <<http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-11.en.pdf>>. Each of the research jurisdictions in this thesis save for the USA is a State Party to the CRC.

community recognised that children, as a result of their vulnerability, often need special care and protection that adults do not. The CRC confirms that children everywhere have the following rights: to survival; to develop to the fullest; to protection from harmful influences, abuse, and exploitation; and to participate fully in family, cultural, and social life.

The four core principles of the CRC are non-discrimination; the best interests of the child; the right to life, survival, and development; and respect for the views of the child. Each right set out in the CRC is inherent to the human dignity¹⁰⁴ and development of every child. The CRC protects children's rights by setting standards. It is tempting but erroneous to conclude that because the CRC has acquired almost universal ratification, it has therefore evolved in its entirety, albeit rapidly, into customary international law. However, the number and range of reservations makes such a broad claim implausible.¹⁰⁵ Despite this, some of the provisions have attained the status of customary international law.¹⁰⁶

The CRC does not have a court to interpret or enforce the rights contained in the convention. It does, however, have a Committee on the Rights of the Child, which examines the realisation of the obligations contained in the Convention.¹⁰⁷ The Committee considers the initial and the periodic reports submitted every five years by a State Party. The Committee may make suggestions and general recommendations. Further, the Committee may cooperate with nongovernmental organisations, for example, private children's rights organisations.¹⁰⁸

To help stem the growing abuse and exploitation of children worldwide, the UN General Assembly in 2000 adopted two optional protocols to the CRC to increase the protection of children from involvement in armed conflicts and from sexual exploitation. The 2000 Optional Protocol on the involvement of children in armed conflict, which counts 158 States Parties, establishes 18 as the minimum age for compulsory recruitment and requires States Parties to do everything they can to prevent individuals under the age of 18 from taking a direct part in hostilities.¹⁰⁹

104 The respect for human dignity seems to be the foundation of human rights in general. Due significantly to its centrality in both the United Nations Charter and the UDHR, the concept of 'human dignity' plays a central role in human rights discourse. The ICESCR and the ICCPR both state that all human rights derive from the inherent dignity of the human person. Dignity is central to the Preambles to the principal inter-American, Arab, African, and European human rights instruments.

105 For the full list of reservations, see <www.ohchr.org>.

106 Although the making of reservations is by no means a conclusive test, as states are able to opt out of customary rules by persistent and consistent objection, the few reservations to Article 3(1) which have been made are of such a nature that they endorse the principle rather than reject it.

107 Article 43 CRC. As well as having an obligation to implement the CRC, States Parties have a duty to implement any concluding observations made by the Committee.

108 Article 45 CRC.

109 Available at: <www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>. Entered into force 12 February 2002.

The 2000 Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography, which counts 168 States Parties, establishes that States Parties confirm that every child has the right to protection from all forms of exploitation. This Optional Protocol provides that States shall take legal and other measures to prevent the sale of children, child prostitution, and child pornography. For example, in the context of adoption, States Parties shall ensure that improperly inducing consent for the adoption of a child is fully covered under their criminal law.¹¹⁰ This Optional Protocol draws special attention to the criminalisation of serious violations of children's rights and emphasises the importance of increased public awareness and international cooperation in efforts to combat them.

The UN General Assembly adopted a third Optional Protocol to the CRC on a communications procedure, which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two Optional Protocols.¹¹¹ The Third Optional Protocol opened for signature on 28 February 2012 and entered into force on 14 April 2014.¹¹² The Third Optional Protocol provides the Committee on the Rights of the Child with the competence to examine individual and interstate communications as well as to initiate inquiry procedures for grave or systematic violations. All this can be done not only in connection with the CRC itself but also regarding the first two Optional Protocols.

The Optional Protocols must always be interpreted in light of the CRC as a whole, in this case guided by the principles of non-discrimination, best interests of the child, and child participation.

By agreeing to undertake the obligations of the CRC and, as the case may be, the Optional Protocols, States Parties have committed themselves to protecting and ensuring children's rights, and they have agreed to hold themselves accountable for this commitment internationally. This commitment should not be taken lightly.

110 Article 3(1)(a)(ii) of the 2000 Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography, *available at*: <www.ohchr.org>.

111 Optional Protocol to the Convention on the Rights of the Child on a communications procedure adopted at the 66th session of the United Nations by resolution 66/138 of 19 December 2011 and open to signature. For more information, see Office of the High Commissioner for Human Rights, Children empowered to complain about rights violation under new UN protocol, *available at*: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11732&LangID=E> (21 February 2012) and UN Treaty Section announcements and events *available at*: <<http://treaties.un.org>>. See also G. van Bueren, 'Acknowledging Children as International Citizens: A Child Sensitive Communications Mechanism for the Convention on the Rights of the Child' in A. Invernizzi and J. Williams (eds.) *The Human Rights of Children* (Ashgate Publishing 2011).

112 According to Article 19, the Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession. That Protocol has now been signed by 46 states. There are 14 States Parties to the Optional Protocol: Albania, Andorra, Belgium, Costa Rica, Thailand, Gabon, Germany, Monaco, Montenegro, Portugal, Spain, Slovakia, Ireland, and Bolivia. See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en>.

4.7.1 *The child's rights*

The CRC establishes minimum standards. Article 41 CRC points out that when a State Party already has higher legal standards than those seen in the Convention, the higher standards prevail.¹¹³

Zermatten observes that '[t]he CRC creates a new status of the child based on the recognition that s/he is a person and has the right to live a life of dignity and since the promulgation 1989 (sic) the child has been understood to be a subject of rights'.¹¹⁴ The CRC defines a child as under the age of 18 unless under the law applicable to the child, majority is attained earlier.¹¹⁵ Children, as rights holders, are entitled to special protection measures and, in accordance with their evolving capacities, the progressive exercise of their rights.

The Committee on the Rights of the Child reaffirms that the CRC is to be applied holistically in early childhood¹¹⁶, taking account of the principle of the universality, indivisibility, and interdependence of all human rights.¹¹⁷

The CRC covers aspects related to the promotion and protection of children such as consideration of the best interests of the child in policy-making (Article 3), the right to grow up in a family context (Articles 5, 9, and 18), the right to grow up without interference (Article 16¹¹⁸), and the protection from abuse and neglect (Article 19).

Article 2 CRC: The right to non-discrimination

By Article 2 CRC, the States Parties undertake to respect the rights referred to in the CRC and to guarantee them for every child within their jurisdiction, without making any distinction, regardless of any consideration of race, colour, gender, language, religion, opinion, whether political or otherwise of the child or its parents or legal representatives, their national, ethnic or social background, their wealth, their disability, their birth or any other situation. The States Parties are to implement all suitable measures to ensure that the child is effectively protected against any form of discrimination.

113 See Article 41 CRC, which mentions that wherever standards set in applicable national and international law relevant to the rights of the child are higher than those in the CRC, the higher standards shall always apply. Other international and regional human rights instruments (discussed in this chapter), including general human rights, international humanitarian law, refugee law, as well as specific instruments focusing on children, are important guides in a best interests determination.

114 J. Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' [2010] 18(4) International Journal of Children's Rights, 483. Zermatten is the Director of the International Institute for the Rights of the Child and Vice-Chairperson of the United Nations Committee for the Rights of the Child.

115 Article 1 CRC.

116 General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, at para. 4. Available at: <www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>.

117 General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, at para. 5. Available at: <www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>.

118 Article 16(1) CRC provides: 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation'.

Article 3 CRC: Best interests

Article 3(1) CRC lays down the general principle – to be found throughout the Convention – that in all actions concerning children, the best interests of the child should be a primary consideration.¹¹⁹ Even though this notion is flexible, its interaction with the rest of the Convention is summarised neatly by Tobin: ‘*a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention*’.¹²⁰ So where one (or more) of the rights of the CRC is at stake, the notion of the best interests of the child should be applied in conjunction with this or these right(s). When no other right is applicable, the notion of the best interests of the child can be relied upon as a stand-alone principle.¹²¹ When determining the best interests of the child, it is therefore important to consider all the rights of the child.

For certain specific actions, including adoption and separation from parents against their will, the CRC requires that the best interests be the determining factor, whereas for other actions, it has to be a primary consideration, which does not exclude other considerations to be taken into account. The best interests of the child are a primary consideration; importantly, it is not prescribed by the CRC that the best interests of the child should be the determining consideration. This means that even if a certain decision is not in the child’s best interests, it can still be taken by the relevant authority without infringing the CRC if someone else’s needs (for example, one of the parent’s) outweigh the best interests of the child. The interest of the child is neither the only consideration to be taken into account nor a decisive consideration. It does not have absolute priority. That being so, the best interests principle is not designed to be a kind of ‘trump card’.

Duty of protection of the state

Article 3(2) CRC obliges States Parties to guarantee that the child receives the protection and care required for its well-being, in view of the rights and duties of the child’s parents, guardians, or other legally responsible people for the child, and to take any suitable legislative and administrative measures for this purpose. Paragraph 2 is formulated as an obligation for the State Parties. It has a subsidiary function, to the extent that it seeks to fill any gaps in the CRC: it obliges the State Party to take any ‘*suitable legislative and administrative*

119 Article 3 CRC reads as follows: ‘1. In all actions concerning children, whether undertaken by public or private social welfare, institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

120 J. Tobin, ‘Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children’s Health Needs’ [2006] *International Journal of Children’s Rights* 14, 287.

121 S. Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 90. The UNHCR has provided guidelines at how the best interest of the child is determined by the UNHCR in cases where migrant/asylum-seekers children are unaccompanied; see <www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20release%20May%2006.pdf>. The Guidelines are for the benefit of staff from UNHCR, implementing and operational partners who are required to make and document a formal determination of the best interests of the child at field level.

measures' for the protection and care of the child in all cases where the CRC does not specifically provide for an act or omission required for the well-being of this child. Its scope is not therefore limited to those areas expressly referred to in the CRC.

Right to registration at birth

Birth registration, the official recording of a child's birth by a state, establishes the existence of the child under law and provides the foundation for safeguarding many of the child's civil, political, economic, social, and cultural rights.¹²² Article 7 CRC specifies that every child has the right to be registered at birth without any discrimination.¹²³ Apart from being the first legal acknowledgement of a child's existence, birth registration is central to ensuring that children are counted and have access to basic services such as healthcare, social security, and education. A birth certificate as proof of birth can support the traceability of unaccompanied and separated children and promote safe migration.

The overall role of birth registration has since been elaborated upon by the Human Rights Committee in its General Comment No. 17 on child rights:

The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of rights provided for in the covenant.¹²⁴

The CRC is not the only international instrument to address birth registration. The African Charter on the Rights and Welfare of the Child and the Covenant on the Rights of the Child in Islam expound a right to birth registration, where it is housed alongside the right of a child to a name and a nationality.¹²⁵ While the European and American human rights conventions remain silent on this issue, the question of access to birth registration can be inferred under the auspices of related provisions from the respective conventions (Article 8 ECHR and Article 18 ACHR). The right to birth registration is therefore to be considered as unconditional, and no children should be excluded.

122 See a study for the Legal Affairs Committee of the European Parliament, 'Life in Cross-Border situations in the EU (a comparative study on civil status)' (2013) (*available at*: <www.europarl.europa.eu/studies>). The study explains that some states can be considered to have a combination of types of civil status registration systems as they may have different registers for different purposes (42 *et seq*).

123 Article 7 CRC reads: '1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.

124 CCPR General Comment No. 17: Rights of the Child (Art. 24), Geneva: 7 April 1989, para. 7.

125 Article 6(2) of the African Charter on the Rights and Welfare of the Child; Article 7(1) of the Covenant on the Rights of the Child in Islam.

4.7.2 *Parent-child relationship*

The CRC does not only focus on children's rights. Multiple articles give consideration to the rights and responsibilities of parents. The CRC offers no definition of the term 'parent' or 'guardian' and seems to accept that the role of primary carer can be played, *de facto* or *de jure*, by a range of different adults who may or may not have genetic ties with the child. As discussed above, Article 3(2) CRC lays down an obligation for States Parties to take all appropriate legislative and administrative measures to ensure that the child receives such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her. The difficulty in applying Article 3(2) CRC is that the States Parties on the one hand have to ensure the child's protection and care, while, on the other, they have to respect the parents' rights and duties. Upholding both can be difficult when there are conflicting interests.

The CRC uses a wide variety of terms to refer to family relationships.¹²⁶ Of course, drafted in the 1980s and before many of the complexities discussed in the previous paragraphs had fully come to light, the term 'parent' is used in the CRC without any indication as to whether the term refers to the child's genetic, social, or legal parents and, in this respect, simply begs the question as to how States should determine 'parentage' for these purposes. In this respect, the UK lodged a declaration when ratifying the CRC, stating that: '*The United Kingdom interprets the reference in the Convention to "parents" to mean only those persons who, as a matter of national law, are treated as parents*'.¹²⁷ Nonetheless, this ambiguity cannot detract from the fact that, in a cross-border context, if a child has uncertain or 'limping' parentage (as a result of two states confirming legal parentage in a different manner), this will likely seriously compromise the child's ability to enjoy many of these rights. Thinking further, limping parental status may in itself breach the requirements of Articles 7 and 8 CRC. In fact, if this situation arises, it may, in turn, breach another of the child's fundamental rights, not only found in the CRC but in many international and regional human rights treaties: that is, his or her right not to be discriminated against simply because of the complexities and challenges surrounding his or her birth and status.

¹²⁶ The following terms can be found in the CRC: 'parents', 'family members', 'legal guardians', 'parents or other members of the family', 'other individuals/persons legally responsible for the child', 'persons having responsibility for the maintenance of the child', 'others having financial responsibility for the child', 'members of the extended family or community as provided by local custom', 'others responsible for the child', and 'any other person who has the care of the child'.

¹²⁷ 7 September 1994, see status table available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#15>.

In general human rights terms, the right to family unity¹²⁸ is established in Article 16 CRC which provides:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

In addition to Article 16, States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognised by law without unlawful interference.¹²⁹ Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establish speedily his or her identity.¹³⁰ In a way, this right is broader than the right to know and be cared for by one's parents as this right applies to a larger group of people and does not contain the qualification 'as far as possible'; on the other hand, the right does allow lawful interference with family relations.

The CRC provides a list of fundamental safeguards to ensure fair treatment of children, including the rights to information,¹³¹ expeditious decisions,¹³² and prompt access to legal assistance and to prompt decisions by the court.¹³³ Article 12 CRC grants the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her, and it grants the child the right to be heard in any judicial and administrative proceedings affecting him or her. Article 12 CRC, which establishes the child's right to be heard and taken seriously, is of particular importance. Paragraph 1 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child. It requires that the views of the child be given due weight under certain conditions. In addition, paragraph 2 establishes that children shall be provided the right to be heard in any judicial or administrative proceedings affecting them, either directly or through a representative or an appropriate body. It is important to know the child's thoughts and feelings in order to properly assess the impact of a proposed action on the welfare of the child. The views of the child should be given due weight in accordance with his or her age and maturity. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as

128 *See also* the right to respect for private and family life, such as is established under Article 8 ECHR and Article 17 ICCPR.

129 Article 8 CRC.

130 Articles 8(1) and (2) CRC.

131 Article 17 CRC.

132 Article 10 CRC.

133 Article 37(d) CRC.

capable of expressing her or his own views. The CRC, however, anticipates that this matter is to be determined on a case-by-case basis, since it refers to age and maturity, and for this reason, requires an individual assessment of the capacity of the child.¹³⁴ A decision whether the determination of parentage in a specific case is in the child's best interests can be taken by the competent authorities and should be subject to judicial review.¹³⁵ Also, all interested parties should be given an opportunity to participate in the proceedings and make their views known.¹³⁶ All interested parties include the child in question.

Article 22(2) CRC imposes an obligation on States Parties to assist in efforts to trace the members of the child's family with a view to family reunification. The final sentence of that provision provides that: '*In cases where no parents or other members of the family can be found, the child shall be accorded the same protection and care as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention*'. For children born of surrogates who are legally parentless, this obligation is particularly relevant.

The CRC recognises the importance of the family in promoting and securing children's development. Indeed, this is expressed in the preamble which provides *inter alia*:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members, and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community [...].

This statement is based on the consideration that in view of the inevitable dependence of the child on his/her parents or guardian, many of the rights in the Convention must be realised by or through the parents or guardian, albeit with the assistance of the state.¹³⁷ Thus, the CRC establishes in Article 18 the principle that parents or guardians have the primary responsibility for the child and the realisation of his/her rights, with the state exercising a secondary role. Article 5 CRC in particular embodies a wider notion by providing:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, legal guardians or other persons legally responsible for the child' to provide, in a manner consistent with the evolving capacities of the

134 See the CRC General Comment No. 12 (2009) discussing the right of the child to be heard.

135 Article 9(1) CRC.

136 Article 9(2) CRC.

137 For critical commentary, see D. Gomien, 'Whose Right (and Whose Duty) is it? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child' [1989-1990] 7 New York Law School Journal of Human Rights, 161-175.

child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

States Parties not only have to give consideration to but also to respect the responsibilities, rights, and duties of parents (or other persons legally responsible for the child) to provide appropriate direction and guidance in the exercise by the child of the rights recognised in the CRC.¹³⁸ It is not surprising that the CRC takes the rights and duties of the parents into account considering that it places the primary responsibility for the upbringing and development of the child on the child's parents (or legal guardians). The parents have common responsibilities and the best interests of the child should be their basic concern.¹³⁹ Article 18 reaffirms that parents or legal guardians have the primary responsibility for promoting children's development and well-being, with the child's best interests as their basic concern (Articles 18(1) and 27(2)). States Parties should respect the primacy of parents. This includes the obligation not to separate children from their parents, unless it is in the child's best interests (Article 9). Two examples are provided of when a separation might be deemed to be necessary for the best interests of the child: abuse or neglect of the child and where the parents are living separately and a decision must be made about the child's place of residence. Article 9(2) specifies further procedural guarantees: all interested parties must be allowed to participate in the proceedings and make their views known. The interested parties are not limited to the parents, but extend to the child. This is evident when Article 9(2) is read in conjunction with Article 12 CRC.

In addition, the CRC confers upon the child the right to recover maintenance from parents or other persons having financial responsibility for the child (Article 27(4)); right of freedom of expression (Article 13); freedom of thought, conscience, and religion (Article 14); freedom of association (Article 15); right to education (Article 28); and in general, not to be subjected to arbitrary or unlawful interference with privacy, family, home, or correspondence (Article 16).

4.7.3 *Relevance to surrogacy*

While the CRC makes special provisions for refugee, disabled, and adopted children, there is no reference to children born by surrogacy or through assisted reproduction that might face disputes as to parentage. The absence of any reference to surrogacy arrangements in the CRC perhaps reflects how quickly medicine has advanced since the CRC was ratified in 1989. Nevertheless, the CRC (and other international human rights treaties) contains

¹³⁸ Article 5 CRC.

¹³⁹ Article 18(1) CRC.

provisions which are relevant in terms of setting a broad rights framework with which substantive laws on legal parentage and child protection measures should comply.

It has been discussed above that surrogacy implicates several rights of the child under the CRC. First, the child's rights are to be '*respect[ed] and ensure[d] [...] without discrimination of any kind [...] [including] birth or other status*'. While this provision was originally intended to protect children born out of wedlock, its inclusiveness suggests a generous and expansive application, including surrogate-born children.¹⁴⁰ Children born of surrogacy arrangements should not be subjected to a disadvantage or detriment as a result of any difference in legal status conferred on their parents or guardians. Second, there are a number of rights set out in the CRC that involve the relationship between children and their parents or guardians. These rights recognise the importance of parents in safeguarding the interests of children. However, the language used in the CRC is not limited to parents and recognises that in some circumstances, these responsibilities will also fall on other persons or legal guardians.

In its General Comment No. 14 (2013), the Committee on the Rights of the Child makes clear that, in the context of the right of the child to family life, protected under Article 16 CRC, the term 'family' must be '*interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community [...]*'.¹⁴¹ Article 8 CRC also provides that States Parties will: '*Undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference*' (emphasis added, MWG). Those 'family relations' should arguably include the relationship not only between a child and a legal parent but also between a child and the intending parent(s) and the wider family. The Committee on the Rights of the Child has noted that in practice, family life and patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size and composition, parental roles, and arrangements for bringing up children. These trends are also relevant in the context of surrogacy.¹⁴²

Best interests

As considered above, Article 3 CRC sets out the principle that the best interests of the child are a primary consideration in all actions concerning children. The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and a responsibility for realising children's rights. Any decision and action

¹⁴⁰ Article 2(1) CRC.

¹⁴¹ Para. 59.

¹⁴² *Ibid*, para. 19.

affecting the child, including, among others, identification and registration, family tracing, the determination of the most appropriate temporary care arrangement, the appointment of a guardian, monitoring of temporary care arrangements, and family reunification, must all be infused with considerations for the best interests of the child in mind.

Non-recognition of the parent-child relationship in the context of surrogacy is likely to have a number of serious consequences for the substantive day-to-day rights and welfare of the child, in particular regarding the child's right to acquire a nationality,¹⁴³ the child's right to an identity,¹⁴⁴ and states' obligations to ensure that children do not end up stateless.¹⁴⁵ Notably, the CRC requires States Parties to take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper gain for those involved in the adoption, and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (discussed below) incorporates the same reference to improper gain, which suggests that some measure of gain may be legitimate.¹⁴⁶ These themes resonate in the context of surrogacy.

Article 3(2) CRC does not, in principle, specifically cover the recognition of foreign decisions relating to filiation. States Parties are actually free to choose the means required albeit subject to a best interests determination. When the child born of a surrogate mother is within the jurisdiction of a State Party, Article 3(2) CRC obliges that State Party to take any suitable measures to protect and care for the child even if it refused to recognise the parent-child relationship with the intending parents. When the child born to a surrogate is still in the country of birth without having the nationality of the state because it attributes the parent-child relationship with the intending parents, the State Party cannot, by ruling on the recognition of this parent-child relationship, leave aside the consequences of its decision in relation to the best interests of the child.

According to Article 20 CRC, States Parties shall provide special protection and assistance to a child who is temporarily or permanently deprived of his or her family environment or in whose own best interests cannot be allowed to remain in that environment. Although the CRC does not establish specific procedural safeguards for the appointment of a guardian and for decisions on alternative care for children deprived of their family environment, Article 20 CRC refers to national laws where specific guarantees are generally present. It follows from the personal scope of Article 20 CRC that special protection and assistance is relevant where the child is treated as parentless. Accordingly, legal responsibility for the child should be vested in a designated individual who has the right and responsibility to make decisions in lieu of the parents.

¹⁴³ Article 7(1) CRC.

¹⁴⁴ Article 8 CRC.

¹⁴⁵ Article 7(2) CRC.

¹⁴⁶ Hague Inter-country Adoption Convention, Article 8. It is worth noting that gain implies a potential reward that is greater than that implicated in the notion of reimbursement or cost coverage.

It is submitted that the systematic non-recognition of the filiation of a child born to a surrogate with his or her intending parents – without taking into account the relative importance of the interests of the child in terms of this recognition and, more broadly, that child's best interests considered in the long-term – would not, *prima facie*, comply with Articles 3(1) and/or 8 CRC.

The child's right to know his/her parents and be raised by them

Article 7(1) CRC sets out one of the most important rights of the child: the right, as far as possible, to know and be cared for by one's parents. Article 7(2) obliges States Parties to ensure the implementation of this right. The words 'as far as possible' qualify and tend to weaken this right. It has been argued that the use of this qualifying phrase indicates that children were not intended to have unimpeded access to information on their origins. Van Bueren argues convincingly, however, that this phrase should be read as relating to the practicality of providing the information and not the legality of the obligation itself.¹⁴⁷ Read in conjunction with Article 3 CRC, the right to know and be cared for by one's parents should be interpreted in a way that it is in the best interests of the child to know and be cared for by his or her parents.

Article 7 CRC to know and be cared for by his or her parents presupposes that it is possible to establish who the child's parents are. As will be discussed below, information is not always available concerning the child's origins, which makes realisation of the right under Article 7 difficult in practice. Perhaps as a result, several states have felt the need to lodge reservations in relation to Article 7, to the effect that a failure to provide adopted children with information does not violate the Convention.¹⁴⁸ Despite these reservations and the degree of contention, the Committee on the Rights of the Child has made clear that denying children access to information on his or her biological origins is in violation of Article 7 and that a State Party has a responsibility under the CRC to gather and conserve information concerning a child's identity.¹⁴⁹

The right to know a child's parents and to be raised by them is expressly designed to include a number of exceptions. Article 7(1) CRC gives adopted children the right to find out who are their biological or genetic parents. The same rule should seemingly apply in the event of surrogacy. The child thus has the right to find out who all their 'parents' are: the genetic parents (provider of sperm and any donor or ova), the mother that gave birth, and the people to whom the parent-child relationship is attributed. The refusal by a State

¹⁴⁷ G. van Bueren, 'Children's Access to Adoption Records: State Discretion or an Enforceable International Right?' [1995] 58(1) *Modern Law Review*, 48.

¹⁴⁸ E.g. Poland and the Czech Republic.

¹⁴⁹ See, for example, the Committee comments in relation to baby boxes (*Concluding Observations: Belgium* (18 June 2010) CRC/C/BEL/CO/3, *Concluding Observations: Czech Republic* (4 August 2011) CRC/C/CZE/CO/3) and anonymous birth (*Concluding Observations: France* (11 June 2009) CRC/C/FRA/CO/4).

to recognise the parent-child relationship with the intending parents would not therefore constitute grounds to stop the child from finding out who these people are, whether they are its biological or legal parents, according to the right of the country of birth.

4.7.4 *Birth records, birth name, and registration*

Article 7 CRC also contains an important rule in very strong language: '*The child shall be registered at birth*'. The registration of a child is a key condition for the recognition of her or his existence. Doek observes that without registration (at birth or as soon as possible thereafter), the child is most likely not acknowledged as a person before the law, and in many countries, this means that there is little to no access to healthcare, education, or social services.¹⁵⁰ States are obliged under international law to take measures to preserve a child's identity, and the Committee on the Rights of the Child has stressed that this extends to maintaining critical records, including family details.¹⁵¹ The Committee has also noted that lack of registration '*can impact negatively on a child's sense of personal identity and children may be denied entitlements to basic health, education and social welfare*'.¹⁵² The Committee on the Rights of the Child, in its 'General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3(1))',¹⁵³ has confirmed that birth registration authorities are 'public or private social welfare institutions' within the meaning of Article 3 CRC and hence should consider the best interests of the child as a primary consideration in all actions concerning them.

The Committee systematically recommends States Parties to the CRC to promote and facilitate proper registration of all children born on their territories. The UN General Assembly and the Human Rights Council have adopted resolutions on this subject, the most recent of which reminds states of their obligation to undertake birth registration '*without discrimination of any kind*' and urges them to '*identify and remove [...] barriers that impede access to birth registration*'.¹⁵⁴

The CRC provides for birth registration 'immediately after birth'. This implies urgency and the need to act within a reasonably short period of time. In the case of children born through surrogacy, there is still no uniform requirement as to how that birth registration should be affected and who should be listed as the parents of the child. Given that children

150 J. Doek, 'The CRC and the Right to Acquire and to Preserve a Nationality' [2006] 25(3) Refugee Survey Quarterly, 26-32.

151 See Committee on the Rights of the Child, Concluding Observations for Norway, UN Doc CRC/C/15/Add23 (25 April 1994).

152 Para. 25.

153 Adopted by the Committee at its 62nd session (14 January to 1 February 2013).

154 See the resolution of the Human Rights Council during its 19th Session, 'Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law' dated 16 March 2012 (A/HRC/19/L.24).

have a fundamental right to an identity, a birth registration must honestly reflect all the parties to his or her conception and birth.¹⁵⁵

Denying surrogate-born children accurate birth registrations conflicts with the spirit, if not the letter, of the CRC. As Doek, former Chairman of the Committee on the Rights of the Child, writes:

Registration at birth (or later) and a nationality are indeed key elements for the recognition of the child as a citizen. But this recognition must not only depend on these formalities but also and perhaps even more important on the opportunities the child is given to become a full and active member of her/his community and society. It should be noted that these opportunities should be provided to every child on the territory of the State Party to the CRC regardless whether he/she is registered at birth or has a nationality.¹⁵⁶

It should be noted that these opportunities should be provided to every child within the territory of the State Party regardless of whether he or she is registered at birth or has a nationality. This is in line with what Doek calls one of the characteristic features of the CRC: *'the full and harmonious development of the child's personality, not only with a view to becoming an individual with her/his own personality, but also with a view to become a full member of her/his community and/or society'*.¹⁵⁷

To the extent that the birth state in which the surrogacy has taken place has itself registered the birth and given a name to the child according to the parent-child relationship with the intending parents, the right of the child to birth registration and a name is respected. The problem with respecting the right to a name could, however, arise depending upon the PIL rules of the country of birth and subject, it is suggested, to public policy in that country. It might be argued that any decision of the country of birth with respect to the child's name must in principle be recognised and respected in the country of residence (or nationality) of the intending parents. Steps should particularly be taken to ensure that the child does not have to bear a different name in that state to that featured on that child's identification documents.

It goes beyond the scope of this thesis to elaborate in detail more on the various aspects of birth registration and names, but it is clear that a child will face serious problems in

155 J. Doek, 'The CRC and the Right to Acquire and to Preserve a Nationality' [2006] 25(3) Refugee Survey Quarterly, 26–32.

156 J. Doek, 'Citizen Child: A Struggle for Recognition', keynote speech 2007 available at: <www.jaapedoek.nl/publications/keynote.php>.

157 See the Preamble to the CRC and Article 29 CRC.

being recognised as such if he/she is not properly registered.¹⁵⁸ This is even more so because in many countries there is a link between registration and nationality.¹⁵⁹

4.7.5 *Possible advocacy points*

By collating various pronouncements in the Concluding Observations to a number of State Reports, it is possible to find examples of States Parties' obligations as they relate to respect for and protection of children. To date, the Committee on the Rights of the Child has considered surrogacy in the context of only a small number of State Reports. Denmark has set out its policy and approach to surrogacy in its State Report.¹⁶⁰ In the Committee's 2009 review of the Netherlands, the Committee noted that it is:

[C]oncerned about cases of illegal adoptions, which are the direct consequence of so-called 'weak' adoptions, with special regard to internet sale and surrogacy. The Committee recommends that the State party take all necessary measures to prevent cases of illegal adoption, raise awareness about the rights of the child from this respect as well, and eliminate 'weak' adoptions in accordance with the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption.¹⁶¹

In the Committee's 2013 review of the USA, the Committee was particularly concerned by:

(a) Ambiguous definitions and legal loopholes persist despite the new accreditation act, such as for example the fact that payments before birth and other expenses to birth mothers, including surrogate mothers, continue to be allowed, thus impeding effective elimination of the sale of children for adoption; [recommending that the USA] Define, regulate, monitor and criminalize the sale of children at federal level and in all states in accordance with the Optional

158 For further information, albeit within an EU context, see the 'Final Report for the European Commission, DG JLS on the project No JLS/2006/C4/004' (2008). The more recent study for the Legal Affairs Committee of the European Parliament, 'Life in Cross-Border situations in the EU (a comparative study on civil status)' (2013) (*available at*: <www.europarl.europa.eu/studies>).

159 As discussed in Chapter Five, being undocumented cannot be directly equated with being stateless. However, the lack of official papers to prove nationality, identity or even any other basic personal facts does heighten the risk of statelessness. The topic of nationality is considered at Chapter Five.

160 CRC/C/DNK/4, 22 January 2010.

161 CRC/C/NLD/CO/3, 27 March 2009. The CRC Committee had asked the Netherlands in the 2008 list of issues to respond to the following question: 'Please provide information on the relevant legal framework on domestic and Inter-country adoption procedures and surrogacy, including legislation criminalizing offences'. CRC/C/OPSC/NLD/Q/1/Add., 30 December 2008.

Protocol, and in particular the sale of children for the purpose of illegal adoption, in conformity with article 3, paragraphs 1 (a) (ii) and 5, of the Protocol; including issues such as, surrogacy and payments before birth and the definition of what amounts to 'reasonable costs' [...].¹⁶²

In relation to India, in response to submissions made by civil society groups highlighting concerns regarding the protection of children born in India as a result of inter-country surrogacy arrangements as well as the rights of surrogates,¹⁶³ the Committee requested that India provides information on the measures taken to ensure that legislation and procedures relating to surrogacy are compliant with the CRC.¹⁶⁴ The Committee issued a Concluding Observation stating that '[c]ommercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights'.¹⁶⁵ The Committee also recommended that India '[e]nsure that...legislation to be developed contain provisions which define, regulate and monitor the extent of surrogacy arrangements and criminalises the sale of children for the purpose of illegal adoption, including the misuse of surrogacy'.¹⁶⁶

The absent attention given to surrogacy may reflect initial unease with the issues on the part of the treaty bodies or a failure of civil society groups to bring situations of concern to their attention. Nevertheless, there is likely to be an increased role for the Committee in considering the position of surrogate-born children in a number of jurisdictions (e.g. Russia, Thailand, Georgia, Mexico, Ukraine, and India). The state review process affords a unique opportunity to raise awareness of the many human rights issues and violations. It presents an opportunity to highlight concerns and make concrete recommendations for change.

Aside from the state report system, the Committee on the Rights of the Child also publishes its interpretation of the content of human rights provisions by way of 'General Comments'¹⁶⁷ (some of which have been discussed above) on thematic issues and organises days of general discussion. Given the important application of the CRC in all aspects of

162 Concluding observations on the second periodic report of the United States of America submitted under Article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, adopted by the Committee at its sixty-second session (14 January – 1 February 2013).

163 See the submissions of India Alliance for Child Rights and the Centre for Child Rights and Terre Des Hommes, available at: <www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

164 CRC/C/IND/Q/3-4.

165 Para. 57(d) of the Concluding observations on the consolidated third and fourth periodic reports of India (CRC/C/IND/CO/3-4), 13 June 2014.

166 *Ibid.*, para. 58(d)).

167 For a list of the CRC General Comments, see <www2.ohchr.org/english/bodies/crc/comments.htm>. The CRC General Comments elaborate on rights enshrined in the Convention, clarify States' responsibilities, and encourage state action. The General Comments address broad themes that become apparent during the Committee's consideration of periodic reports.

children's lives (which includes those children born by means of surrogacy and MAR more generally who are currently left in a legal vacuum), a response by the Committee would be welcome.

Lastly, now that the Third Optional Protocol (the communications procedure) has entered into force, the CRC also provides two new ways for children to challenge violations of their rights committed by States Parties: a communication procedure, which enables children to bring complaints about violations of their rights to the Committee on the Rights of the Child if they have not been fully resolved in national courts, and an inquiry procedure for grave and systematic violations of children's rights. It is conceivable that a child could engage the communications procedure if a child's CRC rights were violated (in practice, the vast majority of the complaints are likely to be submitted by representatives of the child, by lawyers, parents, and others).¹⁶⁸

4.8 CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

Inter-country surrogacy raises numerous issues including the socio-economic status of women and their families involved in surrogacy arrangements. It has been recognised internationally that certain human rights are specific to women or need to be emphasised in the case of women.¹⁶⁹ Adopted by the UN General Assembly on 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') is an international human rights treaty that focuses on women's rights and women's issues worldwide.¹⁷⁰ Developed by the UN Commission on the Status of Women, CEDAW addresses the advancement of women, describes the meaning of equality, and sets forth guidelines on how to achieve it.

An Optional Protocol to the CEDAW enables individual women to file complaints before the CEDAW Committee. The Optional Protocol, which entered into force in December 2000, lays out procedures for individual complaints on alleged violations of the Convention by States Parties. It also establishes a procedure that allows the Committee to

¹⁶⁸ See also Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol in UN document A/HRC/W.6.7/2/3 (2010).

¹⁶⁹ CEDAW's concept of the universality of women's rights is reflected in its preamble and content. This approach to the universality of women's rights has generated much debate, with cultural relativists arguing that this is an imposition of 'Western' standards on countries elsewhere. Yet the concept of universal women's rights and the need for consistency across countries in achieving common standards have influenced the Committee's approach to cultural and religious diversity. States Parties often use arguments based on culture and religion, as well as reservations, to justify their failure to fulfil commitments made to CEDAW. See H. Beate Schopp-Schilling and C. Flinterman, *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (Mariam K. Chamberlain Series on Social and Economic Justice) (The Feminist Press, Paperback, 1 December 2007).

¹⁷⁰ 187 States Parties, available at: <www.un.org/womenwatch/daw/cedaw/>.

monitor the implementation of CEDAW and to conduct inquiries into serious and systematic abuses of women's human rights in States Parties. This is only an option for women whose States have ratified the Protocol however.¹⁷¹

CEDAW explicitly guarantees women's human rights, including their rights to participate in social, economic, cultural, and political life: these rights also include less familiar economic and social rights, such as the right to work and the right to health.¹⁷² The right to health is an elusive concept; health depends on multiple factors including heredity and environment. CEDAW assures positive as well as negative rights, imposing obligations on States Parties.

The relationship between gender equality and women's right to health finds expression throughout the CEDAW Convention, but Article 12 is central in that it requires States Parties to take all appropriate measures to eliminate discrimination against women in the field of healthcare and to ensure equal access to healthcare services. However, there are many more articles in the Convention that bear directly or indirectly on women's health. Several relate to family planning and the importance of education and information. Thus, Article 16 (1)(e) recognises women's right to decide on the number and spacing of their children and to have access to the information, education, and means to enable the exercise of this right. Article 10(h) mentions specifically the right to health education, including information and advice on family planning. Article 14(2)(b) reiterates the obligation of States Parties to ensure access to family planning counselling and services for rural women, within the context of a special right to have access to adequate healthcare facilities, while Article 14(2)(h) mentions the right to enjoy certain living conditions, such as rural and marginal urban groups, including migrant workers and women with disabilities, who may encounter barriers in accessing health facilities and services. In addition to these specific guarantees, Article 5(b) more broadly demands recognition of maternity as a '*social function*', rather than a commercial function.

Women may face different forms of coercion in relation to health that violate their rights to autonomy and bodily integrity. General Recommendation No. 24 mentions '*non-consensual sterilization, mandatory testing for sexually transmitted diseases, or mandatory pregnancy testing as a condition of employment*'.¹⁷³ The right to autonomy in making health decisions in general derives from a fundamental principle of CEDAW: dignity.¹⁷⁴ Autonomy is freedom in the positive sense. It is freedom in the sense that one is entitled to recognition of having the capacity to exercise choice in the shaping of one's life. In medical law, for

171 There are currently 105 States Parties, see the status table available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-8-b&chapter=4&lang=en>.

172 The right to the highest attainable standard of physical and mental health is also protected by other international and regional instruments, including Article 12 ICESCR and Article 14 Protocol on the Rights of Women in Africa.

173 Para. 22.

174 Another fundamental principle is liberty.

example, the right to autonomy is the foundation of the right to choose whether or not to receive proposed treatment. These rights form part of a broader discourse on reproductive rights. Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents, and other relevant UN consensus documents.¹⁷⁵ These rights rest on the recognition of the basic right to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health. They may also include the right to make decisions concerning reproduction free of discrimination, coercion, and violence.¹⁷⁶ As part of their human rights commitments, states must strive to promote equality by ensuring that vulnerable groups have access to information and services.¹⁷⁷

Reproductive rights, broadly interpreted, encompass a wide range of activities.¹⁷⁸ These include surrogacy, other forms of assisted conception, female genital surgeries, and the health needs of women with HIV/AIDS. Since reproductive rights are human rights, like other human rights, they should be universally assured.¹⁷⁹ Reproductive rights are relatively new in international law. The basic concept first appeared in the final document approved by the Teheran Conference on Human Rights in 1968, which recognised the '*rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights*'.¹⁸⁰ It was not until the International Conference on Population and Development in 1994 (ICPD, Cairo Conference) that reproductive rights were articulated at a global forum.¹⁸¹ At the

175 While there is a progressive interpretation at UN level, there is no universal consensus on reproductive rights. These rights, embodied in other broader human rights, may include: (i) the right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so, (ii) the right to attain the highest standard of sexual and reproductive health, and (iii) the right to make decisions concerning reproduction free of discrimination, coercion, and violence. For individuals to exercise these rights, certain elements need to be in place, including full and correct information and education on contraceptive methods and sexuality, equality between the sexes, protection of privacy, and access to health services. See United Nations, '1996 International Conference on Population and Development (ICPD): Summary of the programme of action', available at: <www.un.org/ecosocdev/geninfo/populatin/icpd.htm#chapter7>; discussed in Chapter 4.

176 See ICPD Programme of Action, Chapter VII, Reproductive Rights and Reproductive Health, available at: <www.unfpa.org/public/cache/offonce/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Summary;jsessionid=601A58E091A75BA2A74F1ADBD79C0589.jahia01#chapter7>.

177 General Recommendation No. 24 (20th session): Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – women and health.

178 See B. Stark 'Transnational Surrogacy and International Human Rights Law' [2012] 18(2) ILSA Journal of International and Comparative Law, 8-10.

179 See, e.g. General Assembly Resolution 217A (III), U.N. Doc. A/810, at 71 (10 December 1948), stating that, '[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

180 Proc. of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, at 3 (1968), available at: <<http://zvon.org/law/r/teheran.html>>.

181 See <www.ippf.org/our-work/what-we-do/advocacy/icpd>.

conference, the world agreed that population is not just about counting people, but about making sure that every person counts. Surrogacy was not on the agenda at the Conference.¹⁸² The ICPD Programme of Action has recognised that reproductive health and rights, as well as women's empowerment and gender equality, are cornerstones of individual health and well-being, sexual and reproductive health, and population and development programmes.¹⁸³

Legal norms that stem from the right to autonomy include the right to informed consent, privacy, and medical confidentiality, all of which are instrumental to ensuring free decision-making. These rights impose duties on healthcare providers. Providers are bound to disclose information on proposed treatments and their alternatives so as to obtain the informed consent of the person seeking care, and they must respect her right to refuse treatment. The person concerned can only give her voluntary and free consent when she can exercise free choice without the intervention of any element of force, fraud, deceit, duress, or other constraint. Moreover, the individual should also have the legal capacity to give consent. Healthcare providers are also bound to maintain confidentiality so as to allow her to make private decisions without the interference of others, such as male family relatives, whom she has not chosen to consult and who might not have her best interests in mind.

Article 21(1) gives the CEDAW Committee the right to formulate suggestions and general recommendations. The Committee normally directs such suggestions to UN organs or to UN conferences. The CEDAW Committee addresses its general recommendations, through which it interprets the meaning of the Convention's articles, to States Parties.

4.8.1 *Relevance to surrogacy*

Surrogacy as it is practised today, especially inter-country surrogacy, was not of public concern in 1979. It is therefore unsurprising that the Convention makes no direct reference to surrogacy, yet, as discussed above, the Convention is of particular relevance to surrogacy arrangements.

CEDAW refers directly to rights of maternity in that '*states are allowed to adopt special measures aimed at protecting maternity*' (Article 4) and the intent of the protection of

182 Although convened to address population issues, the participants in the Cairo Conference recognised that '1) Family-planning programs should not involve any form of coercion; 2) Governmentally-sponsored economic incentives and disincentives were only marginally effective; and 3) Governmental goals "should be defined in terms of unmet needs for information and services," rather than quotas or targets imposed on service providers. "The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice'.

183 The ICPD Programme of Action, adopted by 179 countries, Chapter VII, Reproductive Rights and Reproductive Health, available at: <www.unfpa.org/public/cache/offonce/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Summary.jsessionid=601A58E091A75BA2A74F1ADB79C0589jahia01#chapter7>.

rights such as maternity leave from work and other discrimination issues related to motherhood.¹⁸⁴ There is no reference to rights of women engaged in work that is the 'occupation of maternity' in service to others. Article 5(b) more broadly demands recognition of maternity as '*a social function*'. On that reading, the role of surrogacy in family formation would seem at odds with the thrust of the Convention. On another reading, a woman's right to choose to procreate and to work presents critical challenges to the idea of 'work' and control over reproduction as understood in the context of the Convention as well as the autonomy and dignity of surrogates who choose to be surrogate mothers.

CEDAW assures the rights of pregnant women including the rights to employment. Article 11(2), for example, sets out the measures to be taken by states to '*prevent discrimination [...] on the grounds of marriage or maternity and to ensure [women's] effective right to work*'. These measures include the prohibition of dismissal for pregnancy or maternity leave, maternity leave with pay or '*comparable social benefits*', and the '*necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment [...] of childcare facilities*'.

Article 12 requires a State Party to '*ensure access to healthcare services, including those related to family planning*' and, more specifically, to '*ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation*'.¹⁸⁵ The protection of maternity, including the promotion of its proper understanding (Article 4(b)) and individual rights to the highest attainable standards of health, requires access to and the provision of information to ensure that patients give their informed consent for medical procedures. Informed consent requires more than just the patient's permission for the procedure: for consent to surrogacy to be considered informed, it must be provided freely and voluntarily, without threats or inducements. The guiding principle is of informed and continuing consent.

An important observation that can be made is that while CEDAW does not necessarily include a right to assisted conception, it does not prohibit surrogacy. Stark comments that to the extent that CEDAW '*focuses on the health of the pregnant woman, it is not inconsistent with surrogacy*'.¹⁸⁶ Rather, CEDAW confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. As a component of ensuring access to

184 R. Holtmaat and J. Naber, *Women's Human Rights and Culture* (Cambridge Intersentia 2011).

185 General Comment by Convention on the Elimination of All Forms of Discrimination against Women Article 12, 3 September 1981, U.N. A/54/38/Rev.1, ch. I, available at: <www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12>. The Committee's General Recommendation No. 24 elaborates on Article 12(1), addressing women's access to healthcare, including family planning services. The Committee recommends that '[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion'.

186 B. Stark 'Transnational Surrogacy and International Human Rights Law' [2012] 18(2) ILSA Journal of International and Comparative Law, 10.

justice for women, States Parties should implement mechanisms to guarantee women's access to information in order to promote the right to informed consent;¹⁸⁷ this should include a statutory and regulatory framework and relevant safeguards. In the context of sterilisation, the CEDAW Committee has made clear that States Parties should '*monitor public and private health centres, including hospitals and clinics, that perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach*'.¹⁸⁸ It is arguable that the same standard should apply to those States Parties that provide for surrogacy (and, more generally, to ART procedures).

While surrogacy raises concerns about exploitation and diminished autonomy, there is no imperative pursuant to CEDAW to prohibit surrogacy on that basis. Cultural imperialism is a relevant concern because the commissioning of a surrogate for the benefit of another more powerful individual(s) suggests, however, that a cautious view should be taken. At the same time, the choices of surrogates are seemingly, in the main, not baby-selling, sex work, or outsourced cheap labour. For some, surrogacy could be characterised and understood as a form of work and the dignity and autonomy of surrogates should not be ignored. If that conclusion is correct, States Parties should provide a framework for assessing and promoting the informed consent of surrogates and States Parties should revise legislation and/or guidance to clearly set out the parameters to ensure that in practice, this consent is informed and voluntary and the health of surrogates is promoted to the highest standards throughout and following the pregnancy.

4.9 UN CONVENTIONS RELEVANT TO PROHIBITION AND PREVENTION OF THE SALE OF CHILDREN AND WOMEN AND TRAFFICKING

International law prohibits the sale of children.¹⁸⁹ Thus, for instance, all sales of children are explicitly banned by the CRC,¹⁹⁰ the reduction of sales of children in the context of

187 In the context of medical ethics, see the Declaration of Helsinki available at: <[www.who.int/bulletin/archives/79\(4\)373.pdf](http://www.who.int/bulletin/archives/79(4)373.pdf)>. The Declaration of Helsinki is a statement of ethical principles developed by the World Medical Association to: 'provide guidance to physicians and other participants in medical research involving human subjects' (para. 1 Declaration of Helsinki). This includes research on people, identifiable human material, or identifiable data. The Declaration was first adopted in 1964 and has since undergone several revisions (in 1975, 1983, 1989, 1996, 2000, and 2008) to accommodate advances in medical science and ethical problems. The Declaration includes principles on informed consent, minimising risk, and adhering to an approved research plan/protocol.

188 CEDAW Committee, Concluding observations: Slovakia, para. 31, U.N. Doc. CEDAW/C/SVK/CO/4 (2008).

189 Article 35 CRC and Article 1 Optional Protocol.

190 States Parties shall take all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form (Article 35 CRC). See also Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography. The Preamble of the Optional Protocol expresses the Parties grave concern at the significant and increasing international traffic

adoption is one of the aims of the Hague Inter-Country Adoption Convention,¹⁹¹ and human trafficking is subject to international criminal sanction.¹⁹² At the regional level, relevant instruments include the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the African Charter on the Rights and Welfare of the Child, the Inter-American Convention on International Traffic in Minors, and the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.¹⁹³

In Chapters Two and Three, public policy and civil and criminal concerns with respect to the commodification of children were raised. Surrogacy arrangements, particularly commercial surrogacy, potentially threaten several of the identity, familial, development, and protective rights to which children are entitled under the CRC and Optional Protocol to the CRC on the Sale of Children. But do (commercial¹⁹⁴) surrogacy arrangements amount to the sale of a child?¹⁹⁵

Article 2(a) of that Optional Protocol to the CRC on the Sale of Children provides that '*Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*'. This begs the question as to the scope and meaning of the terms within this definition. The working definition of 'sale of children' adopted by the Special Rapporteur on the sale of children, child prostitution, and child pornography is '*the transfer of a child from one party*

in children for the purpose of the sale of children, child prostitution, and child pornography. This indicates a distinct preoccupation with the sale of children in general and not only with sales for the particular purposes of prostitution or pornography. Sale is further defined in the Optional Protocol as follows: any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other compensation. Optional Protocol, Article 2(a). National legislations on adoption have reiterated the prohibition against any form of compensation, also incorporating a similar definition of sale. Thus, in 2001, the French Civil Code was amended to provide that the consent of the legal representative of the child to the adoption must be given freely, and obtained without any consideration (France, Loi n° 2001-111 du 6 février 2001 relative à l'adoption internationale, French Civil Code Article 370-3).

191 See, generally, G. Parra-Aranguren, 'Explanatory Report on the Convention on Protection of Children and Co-Operation in respect of Inter-country Adoption', available at: <www.hcch.net/upload/expl33e.pdf>. The Explanatory Report is not an authoritative interpretation of the Convention. Nevertheless, it covers the main issues of the preparatory work and provides information to clarify the object and purpose of the Convention and to better understand the scope of its provisions.

192 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, available at: <www.osce.org/odihr/19223>.

193 Available at: <www.ohchr.org/EN/Issues/Children/Pages/InternationalStandards.aspx>.

194 For the purposes of this thesis, it is recalled that commercial surrogacy is understood as an arrangement where the intending parent(s) pay the surrogate mother financial remuneration or any other form of consideration in excess of the actual out-of-pocket expenses incurred, or to be incurred, by the surrogate mother as a consequence of her carrying and giving birth to the child. See Glossary at 2.1.3.

195 See J. Tobin, 'To Prohibit or Permit: What is the (human) Rights Response to the Practice of International Commercial Surrogacy?' [2014] 63(2) International and Comparative Law Quarterly 317.

(including genetic parents, guardians and institutions) to another, for whatever purpose, in exchange for financial or other reward or compensation'.¹⁹⁶

The ordinary meaning of terms in Article 2(a) of the Optional Protocol such as 'transfer', 'remuneration', and 'consideration' indicates that a commercial surrogacy is an act that is seemingly within the definition of the sale of a child. Put simply, such an arrangement contemplates that a child will be carried to term and delivered by one person (the surrogate) and given (transferred) to another (the intending parent(s)) in exchange for money (compensation). Tobin observes that the CRC and its Optional Protocol read together indicate that under international law:

- a. If any remuneration, of any other form of consideration, is exchanged between persons as a condition of the transfer of a child, this will amount to a 'sale' of a child.
- b. The purpose of the transfer is irrelevant; thus, it does appear to matter that a surrogacy arrangement may have good intentions.
- c. The identity of the person transferring the child is irrelevant; thus, the fact that the persons involved in a surrogacy relationship may have a genetic, biological, or birth connection to the child is irrelevant.¹⁹⁷

On that reading, commercial surrogacy arrangements would amount to the sale of the child on the basis that surrogacy involves both gestation and the transfer of the child. It is this second component which seemingly falls foul of the Optional Protocol. Such a reading, however, is open to challenge and needs to be considered in the context of a review of specific surrogacy arrangements. To suggest that '*any remuneration, of any other form of consideration*' equates to a 'sale' is not axiomatic. It has been discussed that certain states, such as the UK,¹⁹⁸ have legislated to prohibit commercial surrogacy but accept that certain payments are acceptable and, it is suggested, necessary in order to protect each of the parties to the surrogacy arrangement. As discussed with respect to CEDAW, the autonomy and dignity of surrogates to work are relevant and important factors here.

The requirement in the UK is that no money or other benefit, other than for 'reasonable expenses', must be given to the surrogate. However, commissioning parents are permitted to pay the reasonable expenses of the surrogate and third parties, and the court can also authorise additional payments and benefits in certain cases. This means that the UK court has the discretion to retrospectively authorise payments made to the surrogate and will

196 E/CN.4/1994/84, para. 31. O. Calcetas Santos, in her first report as the Special Rapporteur to the General Assembly (A/50/456, annex), defined 'sale of children' as 'the transfer of parental authority over and/or physical custody of a child to another on a more or less permanent basis in exchange for financial or other reward or consideration' (Report of the Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography, Commission on Human Rights. Fifty-fifth Session, 29 January 1999, para. 18).

197 See J. Tobin, 'To Prohibit or Permit: What is the (human) Rights Response to the Practice of International Commercial Surrogacy?' [2014] 63(2) International and Comparative Law Quarterly 336.

198 Surrogacy Arrangements Act 1985. See Chapter Three at 3.8.

do so (and has done so) in appropriate circumstances. The UK statute affords no guidance as to the basis of any such approval or what 'reasonable expenses' means.¹⁹⁹

As considered in Chapter Two, where surrogacy is commercial, additional issues include heightened risks of exploitation, human trafficking, price-driven decision-making, and eugenics. Commercial surrogacy is typically offered through a clinic, which means that there are third parties who have a financial interest in the surrogacy arrangement.²⁰⁰ This raises the risk of exploitation for the financial gain of third parties. Usually an intermediary controls payments, and the timings of those payments, to the surrogate, and, as has been considered with respect to India, there is often little direct interaction between her and the intending parents. This leaves the intermediary in charge of payment to the surrogate.

The lack of clarity as to what criteria or factors could lead to the finding that a surrogacy arrangement amounted to a sale for the purposes of the CRC and the Optional Protocol on the Sale of Children is unsatisfactory and, at a time where the global marketplace in which surrogacy sits has been acknowledged, unhelpful. In the Committee on the Rights of the Child's concluding observations on the second periodic report of the USA pursuant to the Optional Protocol, the Committee found that:

[T]he absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children'.²⁰¹ The Committee has recommended that the USA: 'Define, regulate, monitor and criminalize the sale of children at federal level and in all states in accordance with the Optional Protocol, and in particular the sale of children for the purpose of illegal adoption, in conformity with article 3, paragraphs 1 (a) (ii) and 5, of the Protocol; including issues such as, surrogacy and payments before birth and the definition of what amounts to 'reasonable costs'.²⁰²

The words of the Committee suggest that certain payments, perhaps also 'reasonable costs', are acceptable albeit subject to the condition of being reasonable and known. As we have seen in Chapter Three, the issues of payment and expenses are subject to varying degrees of national scrutiny (e.g. in the UK)²⁰³ and/or subject to public policy assessment. Rather than ignore the financial aspects surrounding surrogacy, it is suggested that there should

199 See Chapter Three at 3.8.5.

200 A. Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' [2010] 35(4) *Signs* 969.

201 CRC/C/OPSC/USA/CO/2, 2 July 2013.

202 *Ibid.*

203 See in Chapter Three at 3.16.6 the table summarising the fees and expenses reported in the case law discussed in that chapter.

be a clear acceptance that there is a need for parameters for determining allowable payments to the surrogate in addition to reasonable expenses.²⁰⁴

Where surrogacy arrangements do, upon assessment, amount to a 'sale' then a criminal law and child law framework is necessary to promote and enforce that policy decision.²⁰⁵ Article 3 of the Optional Protocol to the CRC on the Sale of Children provides that:

Each state shall ensure that as a minimum the following acts [...] are fully covered under its criminal law whether such offences are committed domestically or transnationally or on an individual or organized basis:

(i) offering, delivering or accepting by whatever means a child for the purpose of: a. sexual exploitation of the child; b. transfer of the organs of the child for profit; c. engagement of the child in forced labour.

This list is non-exhaustive and therefore does not prescribe every act which may amount to the sale of a child. Each activity, however, clearly contemplates the exploitation and degradation of the child. In contrast, the intended purpose of a surrogacy arrangement is, in the vast majority of the reported cases considered in Chapter Three, non-exploitative, and indeed it is anticipated that the intending parents will provide appropriate care and support for the child with the consent of the surrogate. In the context of (inter-country) surrogacy, Bulgaria offers an example of national legislation criminalising certain activities with extraterritorial application. Article 4(1) of the Criminal Code provides:

(1) The Criminal Code shall apply to Bulgarian citizens also for crimes committed by them abroad. In respect to surrogacy the relevant provision is Article 182a. (2) The one who, in view of obtaining a pecuniary benefit, tries to convince a parent, through donation, promise, threat or abuse of office, to abandon his child or give consent for adoption, shall be punished by deprivation of liberty of up to one year and a fine of up to BGN Two Thousand. (3) An intermediary, with a view to obtain an illegal pecuniary benefit, between a person or a family wishing to adopt a child, and a parent, wishing to abandon a child, or a woman, who agrees to carry in her womb a child to surrender for adoption, shall be

204 K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), 554, describe their proposed multilateral convention as following a 'generous altruistic' model, requiring that surrogates be provided with income for a year: both during pregnancy and in the three months after birth. They suggest that this should be set at the wages lost if the mother was employed, or if unemployed, at a fixed sum: for example, three times the minimum wage in that country. This is explored further in Chapter Six.

205 See the approach, for example, in California summarised in Chapter Three at 3.10.

punished by deprivation of liberty of up to two years and a fine of up to BGN Three Thousand.²⁰⁶

The realities of the financial aspects of the surrogacy market therefore need to be acknowledged and specific frameworks put in place to ensure that the obligations of the CRC and its Optional Protocol, once enunciated, are satisfied. In that regard, further considerations by the Committee on the Rights of the Child in state-specific circumstances would be welcome.

Other UN Conventions also contain provisions relevant to surrogacy, particularly the dignity of children and women and the respect for and protection of their rights, the question of the unconditional and informed consent of the surrogate being of particular importance. In addition to CEDAW, another relevant UN instrument is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children (known as the 'Palermo Protocol'),²⁰⁷ supplementing the United Nations Convention against Transnational Organized Crime.²⁰⁸ The Palermo Protocol establishes a definition on trafficking in persons, adding that '*the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons*'.²⁰⁹ It aims to facilitate the establishment of domestic criminal offences and international cooperation in investigating and prosecuting human trafficking cases, as well as to ensure the protection of rights of victims of trafficking, with a special focus on women and children. State Parties are required to exercise jurisdiction over trafficking in persons when the offence is committed in its territory (Article 15(1) of the UN Convention against Transnational Organized Crime); it may choose to extend that jurisdiction to situations where the offence is committed outside its territory against or by one of its nationals (Article 15 (2)). It is for each state to decide, once they have consented to be bound by the Palermo Protocol, not only the extent to which they will adopt provisions meant to prevent, suppress, and punish trafficking in persons but more fundamentally, how each state will decide what constitutes 'trafficking in persons' within their own national jurisdiction.²¹⁰

206 See <www.vks.bg/english/vksen_p04_04.htm>. R. Milkov of Maastricht University has provided this reference.

207 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 available at: <www.palermoprotocol.com/general/the-palermo-protocol>.

208 More information on the 2000 UN Convention against Transnational Organized Crime and its Protocols is available at: <www.unodc.org/unodc/en/treaties/CTOC/index.html>. In 2005, the Council of Europe felt compelled to adopt its own Convention on Action against Trafficking in Human Beings, so as to include binding human rights obligations. Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, C.E.T.S. No. 197, at 27, 31 (2005) available at: <www.conventions.coe.int/Treaty/EN/Treaties/Word/197.doc>.

209 Article 3 Palermo Protocol.

210 See J. Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' [2014] 7 Albany Government Law Review 111. Allain comments: 'What emerges from examining the manner

Trafficking as a concept is relevant even if there is no exploitation at the end point. As Allain writes, to understand the obligations which flow from the Palermo Protocol, it is necessary to understand its relationship with the UN Convention against Transnational Organized Crime, as both of these instruments are to be '*interpreted together*'.²¹¹ States Parties have an obligation to criminalise the involvement in an organised criminal group, laundering the proceeds of crime, corruption, and the obstruction of justice, where the offense is transnational in nature. By an '*offence [that] is transnational in nature*', what is meant is that either '*[i]t is committed in more than one State*' or when committed in one state, it '*has substantial effects in another*', or '*substantial part of its preparation, planning, direction or control takes place in another State*', or again, it '*involves an organized criminal group that engages in criminal activities in more than one State*'.²¹² By reading the Convention in conjunction with the Palermo Protocol, it becomes clear that this Protocol is not exclusively applicable to situations where a person is trafficked across an international border, but in fact can be trafficked internally, that is to say: the victim may be moved solely within one state, while the crime by contrast would be 'transnational in nature' if, for instance, it '*involves an organized criminal group that engages in criminal activities in more than one State*'. An '[o]rganized criminal group' has a specific definition applicable both to the Convention and to the Protocol:

'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Allain notes that in criminalising the involvement of an organised criminal group, the Convention requires states '*to adopt legislation which ensures that activities in and around such a group are made illegal*'.²¹³ An active part in the committing of a serious crime, for the purposes of the Convention, includes the following activities: '*[o]rganizing, directing, aiding, abetting, facilitating or counselling*', as well as other activities which knowingly contribute to the aim of a crime.

Trafficking in persons is defined, for the purposes of the Protocol, as follows:

in which the Palermo Protocol has been incorporated into the legal order of various countries is that the very regime of trafficking in persons is fundamentally flawed'.

211 *Ibid*; Article 37 UN Convention against Transnational Organized Crime.

212 UN Convention against Transnational Organized Crime.

213 J. Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' [2014] 7 Albany Government Law Review 111.

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²¹⁴

The application of the Palermo Protocol takes place at the domestic level.²¹⁵ In Moldova, for example, a legislative provision establishes that exploitation includes '*e) using a woman as a surrogate mother or for reproductive purposes; f) abuse of child's rights with a view to illegal adoption [...]*'.²¹⁶ Both Azerbaijan and Moldova have deemed surrogacy to be potentially exploitative.²¹⁷ Further examples of acts deemed to be exploitative can be found in the legislation in other states such as South Africa, where it is deemed that '*the impregnation of a female person against her will for the purpose of selling her child when the child is born*', is to be considered a form of exploitation, while Ukraine speaks of 'forced pregnancy' as another exploitative problem.²¹⁸

The term 'traffic' is not adequate either, as, according to the Palermo Protocol, it implies a 'subsequent exploitation of the child', which is not necessarily the case in the surrogacy sphere. In the Human Rights Council's Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, Mission to Thailand, the Rapporteur notes:²¹⁹

Another form of trafficking brought to the attention of the Special Rapporteur is trafficking for surrogacy. She was informed that 15 Vietnamese women were reportedly brought to Thailand by a Taiwanese company that offered surrogacy

214 Article 3(a) Palermo Protocol.

215 See the work of J. Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' [2014] 7 Albany Government Law Review 111, 115.

216 Law on Preventing and Combating Trafficking in Human Beings No. 241-XVI of 20 October 2005 (unofficial English translation) available at: <www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CCgQFjAB&url=http%3A%2F%2Fwww.hsph.harvard.edu%2Fpopulation%2Ftrafficking%2Fmoldova.traf.05.pdf&ei=IEraU9uHHsOp7AbRh4CoAw&usg=AFQjCNEWIEG2vPJr0-YEbKmKrxDLQKy8VA&bvm=bv.72185853,d.bGE>.

217 Criminal Code of the Azerbaijan Republic, Article 108-1 available at: <www.qub.ac.uk/slavery/?page=countries&category=2&country=11>.

218 Prevention and Combating of Trafficking in Persons Act 2013, Act 7 (South Africa)/Criminal Code of Ukraine, Article 149 (Ukraine).

219 J. Ezeilo, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children' [2012] HRC/20/18/Add.2

services online for childless couples. The women reportedly came to Thailand on the promise of a well-paid job. Upon arrival in Thailand, the women's passports were reportedly withheld and they were confined to the company's premises against their will. When the authorities raided the premises in March 2011, two of the 15 women had already given birth and seven of them were pregnant.

The opportunity to make money out of surrogacy raises the risk of human trafficking. Rundles observes that there are a number of scenarios that might arise²²⁰:

- i. Babies trafficked and claimed to be born through a surrogacy arrangement when they were not. This scenario was raised by Justice Ryan in *Ellison & Karnchanit*²²¹ as a reason why it was necessary for a court in Australia to scrutinise and have sufficient evidence available about the surrogacy arrangement, the artificial conception procedure, the birth of the child, the birth certificate, parentage testing, and other proofs that the child brought to Australia was actually the child born according to the surrogacy agreement.²²² In that case, an independent children's lawyer was appointed to represent the child's interests and to assist the court to elicit more complete and detailed evidence.
- ii. Pregnant women trafficked to countries where surrogacy is practised (perhaps even permitted) and the babies taken away from them.
- iii. Women might be smuggled across borders to countries where surrogacy is practised and forced to engage in surrogacy.²²³ Justice Ryan observed in *Ellison & Karnchanit* that these risks required that the courts and other government agencies be '*satisfied to a high level that babies brought to this country are who it is claimed they are, about the circumstances of their birth and that the subject children have not been wrongfully taken from their parents*'.²²⁴

These practices are incompatible with the equal enjoyment of rights by children and women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

220 O. Rundle. 'Transnational Surrogacy: Mapping the issues' (on file with author).

221 [2012] FamCA 602 at para. 4.

222 Her Honour referred to ex judicial writing about child trafficking by Chief Federal Magistrate Pascoe, which explains the extent and methods used in international baby selling and trafficking, including the trafficking of pregnant women. Pascoe, 'How Trafficking in Expectant Women Affect the Rights of the Child' (paper presented at the 5th World Conference on Family Law and Children's Rights, Nova Scotia, August 2009) cited in *Ellison & Karnchanit* [2012] FamCA 602 at para. 5.

223 A criminal 'baby breeding' ring was exposed in Thailand in 2011, involving 15 women smuggled from Vietnam to engage in surrogacy by a Taiwan-based operation called 'Baby 101.' See P. Shanks, 'Criminal Surrogacy Ring Exposed in Thailand' RH Reality Check, 17 March 2011, available at: <www.rhreality-check.org>.

224 *Ellison & Karnchanit* [2012] FamCA 602 at para. 5.

A further and important aspect of surrogacy in this context, and one in which agents and intermediaries are central, is the use of third-party gametes.²²⁵ Both purchased sperm and eggs may be components of inter-country surrogacy arrangements, but purchased eggs play a far more significant role. Eggs in particular may be obtained from countries other than those of the intending parents or the surrogate. There is a global market in eggs and sperm, with the potential of illegal practices that constitute trafficking and coercive recruitment practices involving threats and deception.

The broader legal framework around trafficking in persons therefore includes international human rights law. The importance of a rights-based and, as the OHCHR stresses, a victim-centred approach to trafficking is well established and complemented by the reports of the Special Rapporteur to the Human Rights Council and the General Assembly²²⁶ and in the Recommended Principles and Guidelines on Human Rights and Human Trafficking.²²⁷ Very little attention has, to date, been paid to how such a response would be developed and applied in the context of surrogacy. In general, it appears that the procedures and approaches developed to date do not take full account of the particularities of surrogacy, which could, on the face of it, amount in certain circumstances to the sale of children and women and, as discussed above, could amount to trafficking. That being so, any consideration of an appropriate national or international response to the realities of surrogacy must consider carefully anti-trafficking and criminal law measures. The scope of the Palermo Protocol should also be expanded to add reproductive organs and tissues, embryonic or foetal organs and tissues, genes, and genetic sequences.

State authorities are obliged to pay close attention to the Palermo Protocol, Article 35 CRC, and the CRC Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography. The Committee on the Rights of the Child has emphasised the need for clear regulation of surrogacy to guard against it amounting to the 'sale of children' or to 'trafficking' to include also consideration of the need for transparency in fees for lawyers and intermediaries in surrogacy agreements, within the meaning of the Optional Protocol.²²⁸

4.10 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

With 78 members (77 member states and the European Union) representing all continents, the Hague Conference on Private International Law is a global intergovernmental organi-

²²⁵ This topic is beyond the scope of this thesis. Nevertheless, it is considered that further research to include the perspective of gamete providers is necessary.

²²⁶ See A/65/288 and A/HRC/20/18.

²²⁷ See E/2002/68/Add.1 (referenced here).

²²⁸ See, e.g. Concluding Observations on the second periodic report of the USA submitted under Article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography (62nd sessions, 14 January-1 February 2013), para. 29 b).

sation.²²⁹ The HCCH's mandate is to harmonise private international law rules at the global level through the preparation, negotiation, and adoption of what are often referred to as 'Hague Conventions' (multilateral treaties). Decisions about the work that the Hague Conference undertakes are not made by the Permanent Bureau, which is the Secretariat of the Hague Conference, but by the Members of the Hague Conference. Decisions are made at yearly meetings of the Council on General Affairs and Policy of the Conference, the organisation's governing body.

Hague conventions deal with topics as diverse as international child abduction, inter-country adoption, legalisation of documents, obtaining evidence abroad, trusts, wills, securities held with an intermediary, parental responsibility and measures for the protection of children, international recovery of child maintenance, and other forms of family maintenance, among others. The HCCH covers very many worldwide jurisdictions but cannot impose; it can only reform by consensus. It proceeds in a measured fashion, incorporating the concerns of the various and diverse family law jurisdictions around the world.

Family law is a particularly difficult subject for harmonisation because it involves divergent normative and cultural viewpoints and emotionally and practically complex problems. That being so, the Hague Conventions take an innovative approach to international children's law. A Hague Convention is, by its nature, an instrument of public international law, often with harmonised rules of private international law. While these Hague Conventions are not human rights instruments per se, a number of existing Hague Conventions provide a legal and cooperative framework which enables States Parties to better implement their international human rights obligations in a cross-border context. For example, a number of conventions relating to children (i.e. Hague Convention on the Protection of Children and the Hague Convention on Inter-country Adoption) enable States Parties to implement more effectively some important provisions of the CRC in a cross-border context. The emphasis is on cooperation, with no authoritative international body charged with resolving disputes or disciplining States Parties.²³⁰

The HCCH has developed a system of post convention services to monitor the operation of the Hague Children's Conventions,²³¹ to assist Contracting States with their effective implementation, and to promote consistency and the adoption of good practices in the operation and implementation of the Conventions.

The Hague Convention on the Protection of Children and the Hague Convention on Inter-country Adoption are particularly relevant to a discussion on surrogacy and are considered in turn.

229 For detailed information on the Hague Conference and the Hague Conventions including the states in which each convention is in effect and dates of ratification, see <www.hcch.net>.

230 A. Estin, 'Families Across Borders' [2010] Florida Law Review.

231 Collectively, the 1980 Child Abduction Convention, the 1993 Inter-country Adoption Convention, the 2007 Family Maintenance Convention, and the 1996 Child Protection Convention.

4.10.1 *Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of children*

The protection of childhood in danger has always been at the heart of the concerns of the HCCH. The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in respect of Parental Responsibilities and Measures for the Protection of Children ('Hague Child Protection Convention')²³² does not contain substantive law; its purpose is to provide rules on jurisdiction and applicable law in disputes concerning children. The Hague Child Protection Convention covers a wide range of PIL issues in four major areas: jurisdiction, applicable law, recognition and enforcement, and judicial cooperation. It applies to a range of legal proceedings involving children, including measures dealing with parental responsibility, custody and access rights, guardianship (of the child or the child's property), and foster or institutional care.²³³ As with other Hague Conventions, jurisdiction is ordinarily placed in the child's state of habitual residence.²³⁴

4.10.2 *The child's rights*

In its preamble, the Hague Child Protection Convention makes general reference to the CRC, and a number of its terms implement more specific provisions, for example, recognising the importance of a child having the opportunity to be heard. It also states in its preamble that the best interests of the child should be a primary consideration in all matters concerning children.²³⁵ Article 23 reproduces a public policy exception with respect to the recognition of measures reserved to the Contracting State.²³⁶ It specifies, however, that the intervention of public policy²³⁷ should take into account the best interests of the child, which principle moreover should inspire the application of all the articles of the Convention.

232 There are 41 Contracting Parties (excluding the USA and India); see the status table at: <www.hcch.net/index_en.php?act=conventions.status&cid=70>.

233 In relation to guidance on this convention, there is a very useful document 'The Revised Draft Practical Handbook', which has been drawn up by the Permanent Bureau of the Hague Conference on Private International Law from May 2011 available at: <www.hcch.net/upload/wop/abduct2011pd04e.pdf>. There is also an Explanatory Report by P. Lagarde which clarifies many issues available at: <www.hcch.net/index_en.php?act=publications.details&pid=2943>.

234 Article 5(1) Hague Child Protection Convention.

235 Article 3 Hague Child Protection Convention.

236 Article 23 Hague Child Protection Convention: '(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. (2) Recognition may however be refused – [...] if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child'.

237 Article 22 Hague Child Protection Convention: 'The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child'.

4.10.3 *Parent-child relationship*

Article 1(2) Hague Child Protection Convention defines the term parental responsibility as to include parental authority or any analogous relationship of authority determining the rights, powers, and responsibilities of parents, guardians, or other legal representatives in relation to the person or the property of the child. Article 3 clarifies that the attribution, exercise, termination, restriction, and delegation of parental responsibility all fall within the reach of the Convention, as do rights of custody.

4.10.4 *Relevance to surrogacy*

It is not easy to draw a clear distinction between the attribution of parental responsibility and the status of legal parentage because, in some states, the acquisition of parental responsibility may, *de facto*, imply the acquisition of a type of status. However, many legal systems do draw the distinction, and while multiple individuals may have parental responsibility for a child, usually only two persons are considered the legal parents. Article 4(a) specifically excludes from its scope ‘*the establishment or contesting of a parent-child relationship*’. This provision excludes from the scope of the Convention measures that are concerned with establishing or contesting the parentage of a particular child or children. The exclusion in Article 4(a) also extends to the status of a child born as a result of an international surrogacy arrangement. Therefore, if an application is made to the authorities of a Contracting State to establish or contest the parentage of a particular child, those authorities will have to look to their non-Convention jurisdictional rules to assess if they have jurisdiction. Similarly, applicable law and the recognition of foreign decisions on this issue are matters left to non-Convention rules.

The Convention may, however, provide a mechanism across States Parties for those intending parents who have acquired parental responsibility in the state of birth on the basis that the child was habitually resident²³⁸ there to preserve that parental responsibility upon the child’s change of habitual residence to the home state of the intending parents under (Article 16(3)).

4.10.5 *Convention on the protection of children and cooperation in respect of Inter-country adoption*

The non-legal term ‘inter-country adoption’ describes the adoption of a child who is habitually resident in one country by an individual or couple who are habitually resident

238 It is accepted that the determination of the habitual residence of a child is not uncomplicated.

in another country. The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (the 'Hague Adoption Convention') establishes standards and guarantees for the protection of children who are adopted internationally.²³⁹ The Hague Adoption Convention and domestic primary²⁴⁰ and secondary legislation exists to establish safeguards to protect the best interests of children by facilitating cooperation between states to prevent child trafficking and to seek to ensure that safeguards and standards for inter-country adoption are equivalent to those that apply in domestic adoption. The Hague Adoption Convention refines, reinforces, and augments the principles and norms laid down in the CRC by adding substantive safeguards and procedures.²⁴¹ The Convention recognises inter-country adoption as a means of offering the advantage of a permanent home to a child when a suitable family has not been found in the child's country of origin. It enables inter-country adoption to take place when the child has been deemed eligible for adoption by the child's country of birth and proper effort has been given to the child's adoption in that child's country of origin.

239 With 93 States Parties (including the research jurisdictions), the convention is widely recognised. See status table at <www.hcch.net/index_en.php?act=conventions.status&cid=69>. For more, see Explanatory Report to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-Country Adoption drawn up by G. Parra-Aranguren, Hague Conference on Private International Law, Proceedings of the Seventeenth Session available on the website of the Hague Conference at <www.hcch.net> under 'Inter-country Adoption Section' and 'Explanatory' documents; see H. van Loon, Report on Inter-Country Adoption, Prel. Doc. No 1 of April 1990, para. 4 in the Hague Conference on Private International Law, Proceedings of the Seventeenth Session, 'Adoption - Co-operation' 11-119; H. van Loon, 'Note on the Desirability of Preparing a New Convention on International Co-Operation in Respect of Inter-Country Adoption' Prel. Doc. No 9 of December 1987 for the attention of the Special Commission of January 1988, Proceedings of the Sixteenth Session, Miscellaneous matters, 165 *et seq.* 3.

240 In the UK, for example, section 56A of the Adoption Act 1976 made it a criminal offence for a person habitually resident in the British Islands to bring into the United Kingdom for the purpose of adoption a child who is habitually resident outside those Islands unless such requirements as may be prescribed by regulations made by the Secretary of State were satisfied. On 30 December 2005, with the coming into effect of the Adoption and Children Act 2002, the Adoption (Bringing Children into the United Kingdom) Regulations 2003 were succeeded by the Adoptions with a Foreign Element Regulations 2005. These render it a criminal offence, punishable with up to twelve months of imprisonment and/or a fine, for a person who is habitually resident in the British Islands to bring a child, who is habitually resident outside the British Islands, into the UK for the purpose of adoption, unless the requirements of the statutory regulations have been satisfied. Like the 2003 Regulations, the 2005 Regulations require the prospective adopter to have obtained the Secretary of State's certificate. Furthermore, the prospective adopters must visit the child in the state of origin (and before doing so have given required information to the relevant local authority). They must inform the local authority of the expected date of the child's arrival and must travel into the UK with the child. They must then, within a period of 14 days, give notice to the local authority of the intention to apply for an adoption order. Among the policy objectives of the 2003 and 2005 Regulations are the prevention of abuses that arise when children are brought into this country by unsuitable adopters: see, for example, *Re C (Adoption: Legality)* [1999] 1 FLR 370 (Johnson J), *Flintshire County Council v. K* [2001] 2 FLR 476 [2001] 2 FLR 476 (Kirkwood J), and *Re M (Adoption: International Adoption Trade)* [2003] 1 FLR 1111 (Munby J).

241 Guide to Good Practice No 1.

The Hague Adoption Convention covers both ‘full’ adoptions – which terminate the pre-existing legal parent-child relationship – and ‘simple’ adoptions, which do not terminate that relationship.²⁴² The Convention applies where a child habitually resident in one Contracting State has been, is being, or is to be moved to another Contracting State, either after his or her adoption in the state of origin by the intending parents or for the purpose of such an adoption in the home state of the intending parents. It does not dictate where the adoption proceeding will take place, and it assigns responsibilities to the Central Authorities of both the state of origin and the receiving state. The only criterion to be satisfied to enable parties to utilise the inter-country adoption process provided is that the parties (i.e. the prospective adopters) are habitually resident in a Contracting State (the receiving state) and that the child is habitually resident in another Contracting State (Article 2). By Article 14 Hague Adoption Convention, persons habitually resident in a Contracting State who wish to adopt a child habitually resident in another Contracting State shall apply to the Central Authority in the state of their habitual residence. Requirements for inter-country adoption are assessed by the state of origin and the receiving state acting in concert. Contracting States may delegate direct adoption services to accredited public authorities or approved individuals. There are four key components of the adoption procedure, as prescribed in Articles 4 and 16 of the Convention: the determinations and verifications to be made by the competent authorities and the Central Authority, respectively, of the state of the habitual residence of the child concerning (a) the adoptability of the child, (b) the question of whether inter-country adoption is in the child’s best interests,²⁴³ (c) the consents necessary for adoption, and (d) the information about the identity of the child. The Hague Adoption Convention, like the CRC, leaves the identity of whose consent is needed to the discretion of the national authorities.²⁴⁴

A child may not be transferred between Convention States until the convention requirements are satisfied, and the adoption and transfer cannot take place until both Central Authorities have agreed that it can proceed. With this approach, either state can veto an adoption on its own public policy grounds. Once an adoption is certified under the Convention, it must be recognised by operation of law in other Contracting States. Under Article 24 Hague Adoption Convention, recognition may be refused in a Contracting

²⁴² Article 2(2).

²⁴³ This has proven to be a difficult task. A comprehensive rights-based guideline or checklist such as that suggested in Cantwell’s (2014) UNICEF publication might help concretise the concepts of ‘best interests’ and subsidiarity: N. Cantwell, *The Best Interests of the Child in Intercountry Adoption* (Innocenti Insight. Florence: UNICEF Office of Research, 2014) available at: <www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf>.

²⁴⁴ Note, however, that the European Convention on the Adoption of Children 2008 sets out at Article 5 the consents necessary before an adoption can occur and specific details concerning the identity of those who must consent and how consent may be dispensed with.

State 'only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child'.

4.10.6 *The relationship between inter-country surrogacy and inter-country adoption*

It has been observed that the relationship between inter-country surrogacy and inter-country adoption is perplexing.²⁴⁵ Surrogacy and adoption are very different phenomena. Adoption is a response to a child needing a family. Adoption is a child protection measure which focuses on the best interests of the child. The acceptance of adoption as an option for family formation recognises that the gestational and social components of mothering can be separated and accomplished by different persons. Surrogacy, however, is a type of assisted reproduction to satisfy the wish of a couple (or a person) to overcome their childlessness. Unlike in the case of surrogacy, adoptive parents are typically not genetically related to the child and they are not involved in the conception of the child. Nevertheless, it has been observed in Chapter Three that in certain jurisdictions with no special rules for surrogacy intending parents may follow an adoption procedure to establish parentage.

In an international context, the question arises as to whether the Hague Adoption Convention applies if the intending parents want to bring the surrogate-born child from the country of birth to their home country. Two particular questions can be raised: Firstly, is the child habitually resident in the state where the surrogate gave birth (if, after the birth, as is typically the case, the child is immediately handed over to the intending parents), if the child does not have any social ties with the surrogate and if there was no intention for the child to stay in the state of birth? Secondly, can the intending parents adopt the child under the meaning of the Hague Adoption Convention? The Convention does not define adoption, but the third paragraph of the preamble makes clear that inter-country adoption is a means to provide a child with a permanent family if a suitable family cannot be found in the state of origin. Adoption within the meaning of the Convention is a means of alternative care if the child cannot be cared for by his or her own parents.

The fact that the Hague Adoption Convention does not technically apply to inter-country surrogacy cases does not mean that States Parties cannot in certain cases (as discussed in Chapter Three) characterise the relationship between the intending parents and the child as one of adoption. If in the home state of the intending parents the choice of law rule on legal parentage does not lead to a legal system on the basis of which the

²⁴⁵ See H. Baker, 'A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to Be Learnt from the 1993 Hague Inter-Country Adoption Convention?' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 26.

intending parents are the legal parents of the child, the only option for the intending parents is probably to apply for adoption. The comparative review in Chapter Three has provided examples where states – in an effort to find long-term solutions – have done just that. Under English law, for example, where the conditions for a parental order are not met, applications for an adoption order or special guardianship order remain alternative routes.²⁴⁶ However, the payments to the surrogate and any intermediary are likely to be problematic in the application of adoption law. In England, section 95 of the Children and Adoption Act 2002 provides that it is unlawful to make or give to any person any payment or reward in consideration of the adoption of the child, the grant of any necessary consent in relation to adoption, the handing over of the child with a view to adoption, or the making of arrangements for the adoption of the child.²⁴⁷ However, the Act grants judges power to authorise payments in what they deem to be appropriate cases.

In the summary of responses to the questionnaire on the abduction, sale of, or traffic in children and some aspects of the practical operation of the Hague Adoption Convention,²⁴⁸ it was reported that States Parties were asked '*Have you experienced any problems concerning the interplay between the 1993 Hague Convention and cross-border surrogacy arrangements?*' These responses (set out at Appendix 3) revealed that of the 46 States Parties which responded, 20 States Parties answered in the negative and 17 States Parties answered with direct or indirect concerns (including Burundi and Sweden who answered with 'not yet'). The remaining States Parties did not answer the question or indicated not applicable. The response from Germany is particularly interesting:

Yes, Germany has experiences with the application of THC-93 to cross-border surrogacy arrangements

In our opinion, it is contrary to the Convention's principles if the application of the Convention finally helps to arrange the legal disorder which was generated due to a commercial surrogacy arrangement which is as such in opposition to the German *ordre public*. The application of the inter-country adoption in these cases might be doubtful as contrary to the following Convention's princi-

246 See the discussion in *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam); albeit in this case an adoption order was not available ('44. The option of a convention adoption order was not however followed as one of the key requirements is that the child to be adopted must, at the relevant time when agreement to adoption is given, have been habitually resident in a part of the British Islands (AFER 2005, reg. 50(b)). As all were agreed that it was in M's interests to be based with Mr and Mrs G in Turkey during the currency of these proceedings, the question of her habitual residence was thereby complicated. In addition the necessary reports that are quite properly required from agencies both in the UK and in Turkey before a court can make a convention adoption order, indicated that there was a potential for substantial delay').

247 Section 95(4) Children and Adoption Act 2002 provides: 'A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding £10,000, or both'.

248 HCCH Prel. Doc. No 4 of April 2010.

ples: For example according to Article 4 lit. c no. 3 and no. 4 THC-93 one major condition for the child's adoptability is that the required consents have not been induced by payment or compensation of any kind and that they must be given after the child's birth. Furthermore, Article 29 Article cannot be observed. Article 17 requires a couple of procedural conditions before the child is entrusted to the prospective adoptive parents. In cases of surrogacy arrangements, though, the entrustment to the intending parents takes usually already place after giving birth to the child. Furthermore, it is doubtful how the principle of subsidiarity can be observed (Article 4 lit. b THC-93). More general, according to Article 8 the Central Authorities have to cooperate and shall take all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Germany would appreciate to find a solution for the children stuck in legal limbo as described above. However, it seems to be doubtful if THC-93 is always the appropriate way out.

In a letter from New Zealand to the Hague Conference dated 15 December 2009, New Zealand wrote to request guidance on the application of the Hague Adoption Convention to adoptions in respect of children born as a result of international surrogacy arrangements:

A further issue highlighted by [surrogacy] arrangements is the legal status of the intending parents in relation to the child. Under New Zealand law the surrogate mother, and her partner if she has one, are the child's legal parents. Adoption is the only means of transferring legal parenthood to the intending parents. The transfer of legal parenthood to the intending parents would meet New Zealand's immigration and citizenship requirements. There is some debate about whether these applications for adoption should be considered under the Inter-country Adoption Convention or as a domestic adoption. We understand that other Contracting States are grappling with similar issues about the possible application of the Convention in these situations.

This is a complex area with every case requiring consideration of the law of the country of the intending parents and that of the surrogate mother. It would be helpful for us if you could answer the following questions:

1. Has the Permanent Bureau considered whether the Inter-country Adoption Convention applies to situations where there is an application for adoption of a child by intending parents habitually resident in one country and the child is born in an overseas country, to an overseas surrogate mother as a result of an international surrogacy arrangement?

2. Does it matter if there is no genetic link between either or both of the intending parents and the child? Does anything turn on the habitual residence of the child?
3. Does the Permanent Bureau have any advice for Contracting States in dealing with these issues?
4. Depending on your answers to the above, if these issues require a multi-lateral solution, would you see merit in a proposal being developed for consideration by the Hague Conference as a possible future project?²⁴⁹

In response, the Permanent Bureau commented that there is a prior question that needs to be addressed concerning the status of the child under the law of the country of his or her habitual residence.²⁵⁰ If under the law of that country the surrogacy arrangement has the effect of establishing parental status in the intending parents rather than the birth (surrogate) mother, then the authorities of that country will probably not regard the removal of the child as within the Hague Adoption Convention as their view may be that the child, being already the child of the intending parents, does not need to be adopted by them; in fact, they may take the view that the child is not adoptable. The question then becomes one of recognition of status, i.e. whether that country would be prepared to recognise the status which the child has under the law of its habitual residence. If not, ‘a catch-22 situation seems to arise’.²⁵¹ If under the law of the child’s habitual residence an adoption is needed, the case appears to fall under the Hague Adoption Convention, whereas under foreign law, the child may not be regarded as ‘adoptable’ by the persons who are already regarded as the child’s parents, and the Hague Adoption Convention might not be regarded as applicable. Cooperation under the Hague Adoption Convention procedures would appear, if this is the case, to be impossible. The Permanent Bureau comments further:

On the other hand, the overseas country may take the view, like New Zealand, that the birth mother retains parental responsibility despite the surrogacy agreement. In this case the intending parents may wish to consider the option of adoption, and the question of the applicability of the 1993 Hague Convention arises. On the narrow issue of whether this situation would fall within the scope of the 1993 Hague Convention, the case does appear to be captured by Article 2(1). The child who is (probably) habitually resident in the overseas country (assumed to be a Contracting State) is to be adopted by spouses habitually in New Zealand, the receiving State. Whether the adoption is to occur in New

²⁴⁹ On file with author.

²⁵⁰ On file with author. Various passages of the response are included in the following paragraphs as these comments inform the debate.

²⁵¹ *Ibid.*

Zealand or in the State of origin, it appears that the 1993 Hague Convention should apply.²⁵²

The Permanent Bureau raises the following concerns (assuming the surrogacy arrangement is considered to be commercial and not altruistic):

It would seem at the very least ironic that the 1993 Hague Convention, which clearly opposes the idea of inter-country adoption as a commercial transaction, should be used to help to complete a commercial international surrogacy arrangement.

[T]he 1993 Hague Convention views the process of inter-country adoption as one in which an appropriate family is sought to meet the needs of a child who is without any suitable alternative in the country of origin. This child-centred approach leads, among others to the general rule in Article 29 that there should be no contact between the prospective adopters and the child's parents until a number of basic conditions are satisfied (except for an in-family adoption). A surrogacy arrangement is obviously inconsistent with this principle.

Article 17, a key provision in the 1993 Hague Convention, requires that, before a child is entrusted to the prospective adopters a number of essential procedures should have been completed and the Central Authorities of both States should have agreed that the adoption may proceed. The Central Authorities should only do this when they are satisfied that the proper procedures (e.g. the exchange of files coming from the child and the prospective adopters) have been applied and that there are no legal obstacles to the adoption. On the other hand, a surrogacy arrangement will often provide that the child will be 'entrusted' to the intended parents without any prior formalities or safeguards.

The issue of parental consent also presents a formidable obstacle. The 1993 Hague Convention makes it clear that the consent of the mother must (if required) 'not been induced by payment or compensation of any kind' (Article 4 c) (3)), and must be 'given only after the birth of the child' (Article 4 c) (4)). By contrast, in a commercial surrogacy arrangement the consent is given as part of a commercial arrangement and in advance of the birth of the child.

It is difficult also to see how the 'subsidiarity principle' (Article 4 b), which requires consideration to be given to the possibility of placement of the child in the country of origin, can be applied within a surrogacy arrangement.

²⁵² *Ibid.*

Where the surrogacy arrangement is 'altruistic' (i.e. not commercial), then Article 4 c) (3) would not arise. Also, if there is a family relationship between the intending and surrogate parents the problem of Article 29 does not arise. With regard to the question of the genetic link (or lack of it) between the child and either of the intending parents, this may affect the child's status at birth under the law of the child's habitual residence. (Some legal systems will recognise a surrogacy arrangement as vesting parental responsibility in the intending parents provided that a genetic link exists.) [...] There is also the question of whether a genetic link means that, for the purposes of Article 29, the adoption is taking place within the family.²⁵³

It is clear from the above that the application of the Hague Adoption Convention to surrogacy arrangements will often be impossible because:

- i. Article 4(c)(3) states that commercial adoptions are prohibited under the Convention.
- ii. Article 4(c)(4) states that the consent of the mother must be given after the birth of the child. In surrogacy cases, the surrogate mother will often have given her consent before the child has even been conceived.
- iii. Article 4(b) sets out the subsidiarity principle, namely, that consideration must be given to the possibility that the child may be placed in the state of origin; this will not apply to many surrogacy cases, particularly international cases.
- iv. Article 29 sets out a general rule that there should be no contact between prospective adopters and the child's parents; this is unlikely to be workable in surrogacy cases as contact will have to take place when the surrogacy arrangement is entered into and when any reproduction process or treatment takes place.

In addition, while step-parent or second-parent adoption may be a route in some states (e.g. the Netherlands, the UK, or Belgium) for an intending mother or second parent to acquire legal parentage, this can be far from straightforward since there may be rules which prohibit an adoption being granted where the prospective adoptive parents took part in a procurement which is unlawful or contrary to public policy.²⁵⁴ Some adoption regimes are also very restrictive and might exclude those who have made any payment to, or have met, the birth mother. It might also exclude same-sex couples (e.g. Switzerland). There are also requirements as to the necessary connections between the adoptive parents, the child, and the country in which the adoption order is to be made.

²⁵³ *Ibid.*

²⁵⁴ HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (2012) Preliminary Document No 10.

In a non-commercial surrogacy arrangement, it might perhaps be possible to apply the Hague Adoption Convention procedures, but this could only be on the basis that, if the terms of the surrogacy agreement and the requirements of the Convention were in conflict, the latter would take precedence. The Central Authorities would have to be involved; the usual procedures for establishing the adoptability of the child and the eligibility and suitability, including the exchange of reports, would need to be applied, and the establishment of parental status of the intending parents should not take place until the requirements of Article 17 had been met. The requirement of Article 4(b) (subsidiarity principle) would also have to be met; this could be the case if the authorities in the state of origin determined that placement with the intending parents was the only suitable arrangement in the particular case and that it would be in the best interest of the child.²⁵⁵

4.10.7 *Relevance to surrogacy*

At first sight, the Hague Adoption Convention would appear to provide a template instrument, with certain amendments, to regulate inter-country surrogacy arrangements. However, the discussion above, the responses from the States Parties set out at Appendix 3, and, perhaps more pertinently, the comments of the Permanent Bureau suggest that it is an inappropriate instrument to respond to the realities of inter-country surrogacy arrangements.²⁵⁶ Equally, it is impossible to ignore the commercial and *de facto* contractual components of surrogacy arrangements. An aspect of surrogacy for which there is no analogy in adoption, and one in which agents and intermediaries are central, is the use of third-party gametes. Both purchased sperm and ova may be components of inter-country surrogacy arrangements, but purchased ova play a far more significant role. Ova in particular may be obtained from countries other than those of the intending parents or the surrogate. Yet there are reasons to look to the Hague Adoption Convention as a template for an international instrument.

It has been suggested by Trimmings and Beaumont and others that the establishment of a convention on inter-country surrogacy based on international cooperation, similar to the Hague Adoption Convention, could offer a pragmatic solution.²⁵⁷ The combined nature of that Convention as an instrument for judicial and administrative cooperation,

²⁵⁵ See H. Baker, 'A Possible Future Instrument on International Surrogacy Arrangements: Are There "Lessons" to Be Learnt from the 1993 Hague Inter-Country Adoption Convention?' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 26.

²⁵⁶ See also the responses of Germany and New Zealand to the Hague Conference's Questionnaire on the abduction, sale of, or traffic in children and some aspects of the practical operation of the 1993 Hague Inter-country Adoption Convention as set out at Appendix 3.

²⁵⁷ K. Trimmings and P. Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' [2011] 7(3) *Journal of Private International Law* 627, 633.

a PIL instrument, and a human rights instrument provides an approach to start a dialogue on an international multilateral response.²⁵⁸ As Baker has noted, the lessons that can be learned from the Hague Adoption Convention are of equal relevance to a discussion on surrogacy.²⁵⁹ Indeed, it would be possible to apply some of the convention procedures and safeguards²⁶⁰:

(a) Recognition policy and the effects of surrogacy on nationality

A concern raised in Chapter Three is the difficulty of the 'limping' legal status of the surrogate-born child. In inter-country adoption, there was concern that adoptions granted in one state were not always recognised in another and that often a child validly adopted in one state had to undergo a second adoption in the state to which he or she was moved. In inter-country surrogacy cases, the most obvious legal problem resulting from the arrangements is the frequent inability of the home state of the intending parents to establish or recognise the legal parentage of the intending parent(s) and the consequent vulnerable position of the child. A legislative instrument responding to inter-country surrogacy could address this in a similar way to that of the Hague Adoption Convention by providing that legal parentage established in the state in which the child was born would also be recognised in the home state of the intending parents.

In the context of the nationality of adopted children, Articles 23 and 24 of the Hague Adoption Convention (dealing with the recognition and effects of adoption) and the recommendations of the Special Commission on the practical operation of the Hague Adoption Convention should be noted. In its meeting in June 2010, the Special Commission reaffirmed Recommendation No. 17 of the Meeting of the Special Commission of September 2005:

17. The Special Commission recommends that the child be accorded automatically the nationality of one of the adoptive parents or of the receiving State, without the need to rely on any action of the adoptive parents. Where this is not possible, the receiving States are encouraged to provide the necessary assistance to ensure the child obtains such citizenship. The policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless.

258 As discussed in Chapter Six, recommendations from relevant Human Rights Treaty Body committees would also be useful.

259 See H. Baker, 'A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to Be Learnt from the 1993 Hague Inter-Country Adoption Convention?' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 26.

260 *Ibid.*

20. Central Authorities should co-operate in the completion of any formalities necessary for the acquisition by the child of the nationality, where appropriate, either of the receiving State or of an adoptive parent.

21. The question of whether nationality will be granted to the child may, where appropriate, be a relevant factor when a State of origin is considering co-operation with a particular receiving State.²⁶¹

Nationality and immigration issues in the context of surrogacy also require responses.

(b) Minimum standards

In relation to inter-country adoption, it is clear from the 1990 Van Loon Report²⁶² that the sale and trafficking of children in the context of inter-country adoption was a major concern and an impetus behind the exploration of new international legislation. By 1989, the CRC had already explicitly addressed such concerns and openly encouraged states to explore multilateral agreements to combat such practices.²⁶³ In relation to surrogacy, concern has been expressed judicially, extrajudicially, in the media, and in academic writing about the vulnerability of the parties involved in such arrangements, and a number of cases have already been reported involving the sale and trafficking of both women and children.²⁶⁴

It is important to appreciate that the Hague Adoption Convention does not require national adoption laws to be uniform: '*The Convention is designed to operate between systems having different internal laws relating to adoption*'.²⁶⁵ Rather it establishes minimum standards and safeguards:

440. The Convention provides a clear set of basic procedures and minimum standards for inter-country adoption, governing *inter alia* the application process, the preparation of reports on the child and the adopting parents, the obtaining of necessary consents, the exchange of information between the two States concerned, the decision concerning entrustment, authorisation for the

²⁶¹ The Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (17-25 June 2010) available at: <www.hcch.net/upload/wop/adop2010_rpt_en.pdf>.

²⁶² *Report on International Adoption*, drawn up by JHA Van Loon (Prel. Doc No 1 of April 1990 – Proceedings of the Seventeenth Session, Tome II PP 11-119).

²⁶³ Adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990. See Article 21, in particular Article 21(c)-(e).

²⁶⁴ E.g., see Prel Doc No 11 at Ch VI. See another example reported at: <<http://allthingsurrogacy.com/articles/2/18/attorney-admits-guilt-in-baby-selling-ring>>. See also the comparative review in Chapter Three.

²⁶⁵ Adoption Good Practice Guide No 1, para. 8.1.2. See also Adoption Good Practice Guide No 1, 13, 'One of the great advantages of the Convention is the flexibility it gives to Contracting States in deciding how its provisions are to be implemented. Each State may adapt its own laws and procedures to implement the Convention'.

child to reside permanently in the receiving State, and the transfer of the child from the State of origin to the receiving State.²⁶⁶

To reach the standards and fulfil the guarantees of the Hague Adoption Convention, a number of professionals need to be involved in the adoption process. As considered in the case reviews in Chapter Three, a number of parties are involved in the surrogacy process: in addition to the intending parents and the surrogate, intermediaries and medical centres often participate. Much like adoption, it is suggested that agreed standards are necessary.

(c) The need for informed consent

Article 4(c)(iv) Hague Adoption Convention requires that the consent of the birth mother to adoption can only be given after the birth of the child. When drafting the Convention, a question arose as to whether national law should be able to obtain the validity of the mother's consent before birth, and its possible revocation, but it is reported that the majority of delegates decided that this rule was necessary to prevent coercion of and abuses against mothers and to guarantee the seriousness of their consent.²⁶⁷ While considerations in relation to consent to adoption may be different to consent to surrogacy (e.g. the timing of the consent), it is nevertheless important to consider whether it is ever possible to give informed and conditional consent before birth for a transfer of a child, whether through an adoption or a surrogacy arrangement. In particular, there is concern that mothers may be pressured to give consent to adoption before birth for social reasons, while in relation to surrogacy, the pressure is predominantly, though not exclusively, financial.

(d) Payment/fees

There is another issue where there is an absence of consensus: the approach to the financial aspects of adoption. The Hague Adoption Convention allows authorities, accredited bodies, and approved (nonaccredited) persons and bodies in receiving states and states of origin to charge reasonable fees for services provided.²⁶⁸ However, the lack of clarity and consistency in deciding what is reasonable has led to situations where prospective adoptive parents are required to pay seemingly excessive amounts to complete an adoption. Furthermore, although the Hague Adoption Convention clearly prohibits improper financial or other gain,²⁶⁹ regrettably, it is still common and leads, in some cases, to abuses, including in extreme cases the abduction, the sale of, and the traffic in children for inter-country

266 Adoption Good Practice Guide No. 1, para. 8.1.1.

267 G. Parra-Aranguren, 'Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption' (Hague Conference on Private International Law, 1993) available at: <www.hcch.net/index_en.php?act=publications.details&pid=2279&dtid=3>.

268 Guide to Good Practice No 1.

269 See Article 32 of the Convention and the Explanatory Report, para. 528.

adoption.²⁷⁰ The 1990 van Loon Report affirmed that '*child trafficking means profit making by intermediaries at the expense literally of the genetic parents and the adopters (to the extent that they act in good faith), and in a broader sense also of the child*'.²⁷¹ The abuses in relation to financial aspects in inter-country adoption affect above all the best interests and the rights of children. The question of fees and the associated abuses are, as has been discussed, very relevant in most cases of inter-country surrogacy. Even in states such as the UK which regulate surrogacy, it appears that the scale of fees and charges is unknown. In the majority of cases where unlawful payments may have been made, the child will nonetheless be in the care of the intending parents and the surrogate mother will usually not desire his or her return. This begs an important question: Would it be possible to imagine surrogacy completely free of charge?

Intending parents can be considered as potential victims of the lack of regulation of the financial aspects of inter-country surrogacy. They are specifically victims when, acting in good faith, they are not aware of the abuses behind the birth of the child and they end up caring for a child where the surrogate has been trafficked.

In light of the perceived challenges in the field of adoption, the Council on General Affairs and Policy recommended in April 2011 the formation of an Expert Group to examine the question of costs in inter-country adoption.²⁷² This recommendation was made as a result of concerns expressed over many years,²⁷³ and specifically at a meeting of the Special Commission on the practical operation of the Convention ('2010 Special Commission'), held in June 2010, that standards and practices in relation to financial aspects of inter-country adoption vary so widely that a special focus on the issue is warranted. At the 2010 Special Commission, a special day was dedicated to the theme of abduction, sale, and traffic in children and their illicit procurement. It was recognised that regulated, reasonable, and transparent fees and charges are essential features of a well-

270 D. Smolin, 'Intercountry Adoption as Child Trafficking' [2004] 39(2) Valparaiso University Law Review 281, 303-304.

271 See J. van Loon, 'Report on Inter-Country Adoption', Prel. Doc. No 1 of April 1990, in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session (1993) Adoption – Co-operation*, para. 81.

272 See 'Conclusions and Recommendations Adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011)'. Available on the Hague Conference website at: <www.hcch.net> under 'Work in Progress' under 'General Affairs' under '2011', para. 25.

273 See, for example, the responses to question Nos 11(3) and 11(6) of the 'Questionnaire on the practical operation of the 1993 Hague Inter-Country Adoption Convention', drawn up by the Permanent Bureau, Prel. Doc. No 1 of March 2005 for the attention of the Special Commission of September 2005 on the practical operation of the 1993 Hague Inter-country Adoption Convention and question 55 of the 'Questionnaire on Accredited Bodies in the Framework of the 1993 Hague Inter-Country Adoption Convention', drawn up by the Permanent Bureau, Prel. Doc. No 1 of August 2009 for the attention of the Special Commission of June 2010 on the practical operation of the 1993 Hague Inter-country Adoption Convention. The 2005 and 2009 Questionnaires and the State responses are available on the Hague Conference website at <www.hcch.net> under 'Inter-country Adoption Section'.

regulated system and will help to prevent, in the context of inter-country adoption, the abduction, sale, and traffic in children and their illicit procurement.²⁷⁴ In relation to financial issues, the Hague Adoption Convention sets out, among others, the following rules and requirements:

- i. Contracting States and Central Authorities have the obligation to take all appropriate measures to prevent improper financial and other gain in connection with an inter-country adoption and to deter all practices contrary to the objectives of the Convention.²⁷⁵
- ii. Competent authorities of the state of origin have to ensure that the consent of the child (having regard to his/her age and degree of maturity) and of the persons, institutions, and authorities whose consent is necessary for adoption 'have not been induced by payment or compensation of any kind'.²⁷⁶
- iii. Costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.²⁷⁷
- iv. No one shall derive improper financial or other gain from an activity related to an inter-country adoption.²⁷⁸
- v. Central Authorities are bound to cooperate to carry out their obligations, including those obligations mentioned above relating to the financial aspects of inter-country adoption.²⁷⁹ Cooperation may take place in the form of the exchange of information relating to a specific instance²⁸⁰ or information sharing about general experiences on how to implement the standards of the Convention.²⁸¹
- vi. Accredited bodies shall pursue only non-profit objectives; their financial situation has to be subject to supervision by competent authorities of their state; and staff remuneration shall not be unreasonably high in relation to the services rendered.²⁸²
- vii. Approved (non-accredited) persons and bodies who undertake adoption for profit are subject to the general prohibition on improper financial or other gain (Article 32(1)) as is every person involved in inter-country adoptions under the Convention. Approved

274 See Conclusions and Recommendations of the Third Meeting of the Special Commission on the practical operation of the Convention (17-25 June 2010). Available on the Hague Conference website at <www.hcch.net> under 'Inter-country Adoption Section' then 'Special Commissions', Recommendation No 1.

275 Article 8.

276 Article 4 (c)(3) and Article 4 (c)(4).

277 Article 32(2).

278 Article 32(1).

279 Article 7.

280 Article 9 (a) and (e).

281 Article 9 (d).

282 Article 11 (a) and (c) and Article 32(3). See also Guide to Good Practice No 2, Chapter 8.3.2.

(non-accredited) persons and bodies may only charge for the actual costs and expenses of the inter-country adoption and reasonable fees.²⁸³

These recommendations are arguably also, in part, relevant in the context of inter-country surrogacy particularly for those states wishing to curtail commercial surrogacy. A multi-faceted approach is needed to respond to the realities of the financial aspects of inter-country surrogacy.²⁸⁴ The publication of fee scales in all countries could, for example, be a possible step in preventing financial abuses as would drives for transparency and express judicial analysis of the fees involved and the payments made.

(e) Shared responsibility

The Hague Adoption Convention is based on shared responsibilities between states of origin and receiving states and is applicable to all actors, whatever their level of participation in the process. The Hague Conference has emphasised the need for cooperation between the children's states of origin and those receiving them. Efficient working relations, based on mutual respect and compliance with agreed professional standards, would contribute to building confidence between such countries. Any multilateral response to surrogacy might also require the same degree of respect and compliance.

(f) Common positioning

The Hague Adoption Convention emphasises among other things the importance of cooperation among states, regulation of costs to eliminate abuses, the need for professional social workers, and the promotion of the principle of subsidiarity through awareness campaigns and domestic adoptions.

In the same way adoption is not a consulate's or embassy's first concern, neither is surrogacy. Nevertheless, embassies and consulates remain essential actors in the process. It is, therefore, important for their personnel to be better aware of and to be able to understand the complex and delicate issues linked to surrogacy. Knowledge of the field, information networks, and diplomatic status remain very useful tools in the positive development of standards and safeguards.

²⁸³ See Guide to Good Practice No 2, Chapter 13.

²⁸⁴ See International Social Service (ISS), *Inter-country Adoption – the Financial Aspects*, Fact Sheet No 47, 2007, available at: <www.iss-ssi.org>; N. Cantwell, *Adoption and Children: A Human Rights Perspective*, Commissioner for Human Rights, Council of Europe, 2010, 20, available at: <www.coe.int/t/commissioner> under 'documents' then 'issue papers'; African Child Policy Forum, *Inter-country Adoption: An African Perspective*, Addis Ababa 2012, available at: <www.africanchildforum.org>.

4.11 COUNCIL OF EUROPE

Various instruments²⁸⁵ have been developed to protect children's rights under the auspices of the Council of Europe.²⁸⁶ Of particular importance to the discussion here is the Convention for the Protection of Human Rights and Fundamental Freedoms, most commonly known as the European Convention on Human Rights (hereinafter, 'ECHR' or the 'Convention'), the Council of Europe's cornerstone fundamental rights instrument.

The ECHR is an encompassing human rights treaty which has been codified to protect the most essential rights and freedoms of the peoples of Europe. For an international convention, the ECHR has one of the strongest monitoring bodies possible in the form of the European Court of Human Rights in Strasbourg (hereinafter, 'ECtHR' or the 'Strasbourg Court') which has generated a large body of case law, which is binding on the specific Contracting Party(ies) to whom the ECtHR's judgments are addressed and is considered persuasive and influential for each of the Contracting Parties to the ECHR.²⁸⁷ Although the effect of the ECtHR's case law is at times contested, given that it does not possess the authority to invalidate national legal norms judged to be incompatible with the Convention, it nonetheless commands broad commitment; thanks to the good faith of (most of) the Contracting Parties.

4.11.1 *European Convention on Human Rights*

The ECHR sets out the civil and political rights and freedoms that the Contracting States agree to ensure for all people living within their jurisdiction. Being more than just a multilateral treaty on reciprocal obligations of the Contracting Parties, the ECHR creates obligations for Contracting Parties with a view to the implementation of the protected rights and freedoms in the domestic legal order of the Contracting Parties.

285 In addition to the instruments discussed in this chapter, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine sets out a series of principles and prohibitions against the misuse of genetic and medical advances. The Convention was opened for signature in 1997 and entered into force in 1999; it has 29 States Parties. The Steering Committee on Bioethics of the Committee of Ministers of the Council of Europe has reiterated the necessity for states to determine clear rules regarding filiation, in particular in cases involving medically assisted procreation. See Council of Europe Committee of Ministers, 1107 Meeting 2 March 2011, para. 19, available at: <<https://wcd.coe.int/ViewDoc.jsp?id=1735853&Site=CM>>. Article 5 provides a general rule on consent: 'An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time'.

286 The Council of Europe consists of 47 members including each of the EU Member States, more information available at: <www.coe.int/aboutcoe/index.asp?page=47pays1europe>.

287 In this context, the case law or case law of the ECtHR does not create precedents *stricto sensu*.

The presence of robust human rights case law, emanating especially from the interpretation and application of the ECHR, has served as a basis for decisions broadening more traditional paradigms of parenthood and the family.²⁸⁸ The comparative review in Chapter Three identified a number of cases in which national courts have considered the applicability of ECHR standards in the context of surrogacy (particularly with respect to Austria, France, Belgium, the Netherlands and the UK). The comparative review also identified that the application of ECHR standards as reasoned by the Austrian highest court on the one hand and the Swiss and French highest courts on the other is at opposing sides of the spectrum.

Applicants before the Strasbourg Court who feel that their particular personal and family situations are not recognised in national law can invoke the protection of the Court once, broadly speaking, domestic processes and remedies are exhausted. The role of the Strasbourg Court is not a fourth-instance one. Rather, the principle of subsidiarity gives it a role that is subsidiary.²⁸⁹ The rule concerning the exhaustion of domestic remedies in Article 35(1) ECHR is based on the assumption, reflected in Article 13 ECHR (with which it has a close affinity), that there is an effective and adequate domestic remedy available, in practice and in law, in respect of the alleged violation.²⁹⁰

Judgments finding violations are binding on the Contracting State(s) concerned and that State (or those States) is (or are) obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the (modest) amounts awarded by the Strasbourg Court to the applicant(s) in

288 Under Article 53 ECHR, the Contracting Parties may develop higher human rights standards than those entrenched in the Convention.

289 J. Gerards, 'Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights', in M. Claes and M. De Visser (eds.), *Constructing European Constitutional Law* (Oxford, Hart 2014). Gerards comments: 'Within this setting the European Court of Human Rights is entrusted with the task of developing and maintaining reasonable standards of fundamental rights protection for the entire Council of Europe. This task is immensely difficult, since the Court cannot simply choose for a maximalist approach, striving for the highest possible level of protection of fundamental rights and imposing that level of protection on all 47 states parties. Such an approach would be irreconcilable with the states' still existing desire for respect for their national constitutional values and policy choices. In 2012, this was confirmed once again in the Brighton Declaration, in which the government leaders of the Convention states expressed the ambivalent expectations they have of the Convention and the Court. They reaffirmed their "deep and abiding commitment to the Convention, and to the fulfilment of their obligation under the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention". Yet, at the same time, they stressed that the Court should take account of the "fundamental principle of subsidiarity" and that "national authorities are in principle better placed than an international court to evaluate local needs and conditions". Hence, the Court must steer a careful course between the Scylla of having to respect national sovereignty and national values and the Charybdis of providing for consistent protection of individual fundamental rights. Sometimes it seems as if it can never make the right choices'. Brighton Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 18-20 April 2012, CDDH(2012)007.

290 See *Kudła v. Poland*, Application No. 30210/96, § 152, ECHR 2000-XI, and *Hasan and Chaush v. Bulgaria*, Application No. 30985/96, §§ 96-98, ECHR 2000-XI).

compensation for the damage they have sustained. When the Strasbourg Court delivers a judgment finding a violation, the Court transmits the file to the Committee of Ministers, which confers with the Contracting State concerned to decide how the judgment should be executed and how to prevent similar violations of the Convention in the future. This usually results in general measures being taken, especially amendments to legislation, and individual measures where necessary. In some cases, the Contracting State will have to amend its legislation to bring it into line with the Convention.

The European mechanism of human rights protection does not, in principle, permit abstract review of the Convention compliance of national laws²⁹¹ and still less an *actio popularis* against legislation.²⁹² Hence, an applicant to the Strasbourg Court must be able to claim to be, have been, or become in the future a victim of a state act. Nonetheless, an individual may contend that a law violates his or her rights in the absence of any specific measure of implementation in his or her respect, if there is a real risk that he or she will be personally affected by the said law. The Court has established two categories of people at risk: those who have to modify their conduct (e.g. under threat of criminal prosecution²⁹³) and those who are members of a class of people who risk being directly affected by the legislation, be it ordinary or constitutional legislation.²⁹⁴ These two categories of people, which may be as broad as to include, for example, 'illegitimate children',²⁹⁵ are known as potential victims.²⁹⁶

In Chapter Three, it was concluded that the non-establishment of the parent-child family relationship and the non-application of citizenship rules have a number of serious consequences for the rights and welfare of the child, in particular regarding the child's right to private and family life, the continuation of personal status, the child's right to an

291 This is true only for individual applications (*see, for example, Von Hannover v. Germany (no. 2)*, Application Nos. 40660/08 and 60641/08, § 116, ECHR 2012). In interstate cases, a state may challenge a legal provision *in abstracto*, since Article 33 ECHR allows a State Party to refer to 'any alleged breach' of the provisions of the Convention by another State Party (*see Ireland v. the United Kingdom*, 18 January 1978, § 240, Series A No. 25, and *Cyprus v. Turkey* [GC], Application No. 25781/94, at 358, ECHR 2001-IV).

292 An *actio popularis* is an action brought by a member of the public who is acting solely in the interest of public order and does not claim to have been, to be or to become in the future a victim of the impugned law or other state act (*see* among other authorities, *Tănase v. Moldova*, Application No. 7/08, at 104, and *X and Others v. Austria*, Application No. 19010/07, at 126, ECHR 2013).

293 *Dudgeon v. the United Kingdom*, 22 October 1981, at 41, Series A No. 45; *Norris v. Ireland*, 26 October 1988, at 32, Series A No. 142; and *S.L. v. Austria*, Application No. 45330/99, ECHR 2003-I.

294 *Marckx v. Belgium*, 13 June 1979, Series A No. 31; *Johnston and Others v. Ireland*, 18 December 1986, at 42, Series A No. 112; and *Burden v. the United Kingdom*, Application No. 13378/05, §§ 33-34, ECHR 2008.

295 *Marckx v. Belgium*, 13 June 1979, Series A No. 31.

296 There is a third group of potential victims: those who have not yet been victims of a Convention breach, but will be if the impugned state act is performed (for instance, an expulsion order). Potential victims should not be confused with indirect victims, a term which refers to persons who have suffered indirect negatives consequences of a state act or omission, like the wife and children of a man unlawfully killed by state officials.

identity,²⁹⁷ right to acquire a nationality,²⁹⁸ and obligations on states to ensure that children do not remain stateless.²⁹⁹ Fundamental rights and interests of the child under the ECHR are implicated, including the right not to suffer discrimination on the basis of birth or parental status,³⁰⁰ the right of the child to have his or her interests regarded as a primary consideration in all actions concerning him or her,³⁰¹ and, as will be discussed below, the right to private and family life between the child and his or her intending parents. Indeed the invocation of the ECHR in proceedings to challenge legislative models of the family that fail to recognise relationships essential to children and those who parent them has already been observed in the domestic context often by way of a national court's consideration of domestic law and, more particularly, its application of a state's public policy exception. While it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment in accordance with that State's obligations pursuant to the ECHR.

The Strasbourg Court has considered two cases which address the extent to which legal parentage (or another family relationship) constituted abroad – no matter what the national policy may be on inter-country surrogacy and even less national private international law rules determine – *may* be recognised even if the intending parents are seemingly cognisant of the fact that the practice is not permitted in their home jurisdiction: *Mennesson and others v. France* and *Labassee and others v. France*. The Court has also considered *D. and R. v. Belgium*³⁰² and *Paradiso and Campanelli v. Italy*.³⁰³ There are further cases involving France pending before the ECtHR: concerning children born in India (*Foulon v. France*³⁰⁴) and in Ukraine (*Laborie v. France*³⁰⁵).

Before turning to consider the lessons from the Strasbourg Court's case law relevant to a discussion on surrogacy, the specific role of the Strasbourg Court, its case law, and its approach requires consideration in order to assess the scope of the Contracting States' obligations pursuant to the ECHR.

297 Article 8 CRC.

298 Article 7(1) CRC. Considered further in Chapter Five.

299 Article 7(2) CRC.

300 Article 2 CRC.

301 Article 3 CRC.

302 Application No. 29176/13.

303 Application No. 25358/12. Chamber judgment handed down on 27 January 2015.

304 Application No. 9063/14.

305 Application No. 44024/13.

4.11.2 *The role and approach of the European Court of Human Rights*

(a) **The child's rights**

While the ECHR confers rights upon all individuals rather than specifically upon children, the extensive case law, as developed by the ECtHR on the meaning of 'private and family life' to determine whether Article 8 rights are engaged, has given the ECHR a wide ambit. Yet in order to ensure that its judgments reflect current standards in children's rights, the Court has sought to refer to other human rights instruments, notably the CRC.³⁰⁶ The relevant provisions of the ECHR in relation to family law are in particular Articles 6, 8, and 14.³⁰⁷

Article 6(1) ECHR provides certain procedural guarantees: access to the courts in relation to the establishment of civil rights and obligations.³⁰⁸ Article 6(1), however, only extends to disputes on civil rights and obligations, which can be said, at least on arguable grounds, to be recognised under domestic law.

The Article 8 ECHR right to respect to private and family life seeks 'to protect the individual against arbitrary action by the public authorities'.³⁰⁹ Article 8 shares its structure with all the Convention's qualified rights: the first paragraph states the content of the guarantee, whereas the derogation clause, contained in the second paragraph, sets forth both general conditions and specific grounds that a Contracting Party may invoke to restrict the operation of rights and freedoms at stake. While, in most instances, the Strasbourg Court does not challenge the legitimacy of a legal interference by the State into an individual's enjoyment of the right, it does require the party to prove that the measure

306 See the ECtHR's factsheets on the 'Use of International Conventions by the Court (References to the Convention on the Rights of the Child; November 2012)' and on 'Children Rights (May 2013)' are available at: <www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=>>.

307 Article 12 ECHR is also relevant. Article 12 reads: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'. As regards the connection between the right to marry and the right to found a family, the Court has already held that the inability of any couple to conceive or parent a child cannot be regarded as per se removing the right to marry (see *Goodwin v. UK*, *infra*). See also the discussion with respect to *S.H. and Others v. Austria*, *infra*, in which the Grand Chamber of the ECtHR held that the Austrian restriction against the use of third-party donor eggs or sperm is not in breach of Article 8 ECHR.

308 Article 6(1) ECHR reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

309 Article 8 ECHR provides: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection for the rights and freedoms of others'.

which is being challenged is 'necessary in a democratic society', inasmuch as it meets a pressing social need and corresponds to shared values. The concept of necessity, of which proportionality³¹⁰ to the aim pursued is an essential ingredient, represents, in most instances, the principal dispute between the applicant and the respondent state. The boundary of this field of assessment, however, has varied over the years, influenced by the continuing social and economic developments of society. The practical application of Article 8 has become, therefore, a challenging exercise, as it is difficult to try and predict its implementation, particularly in sensitive and seemingly controversial issues.³¹¹ Article 8 has touched on many areas of family law including adoption, child abduction, custody and contact, guardianship, identity issues, nationality and surrogacy.

In assessing whether a complaint gives rise to a violation of Article 8 ECHR, the Strasbourg Court adopts a two-stage test.³¹² Stages 1 and 2 are interconnected: the first step is to ascertain whether the complaint falls within the scope of application of Article 8 (Stage 1). If the complaint does not, the Court will stop the examination of the case. The second step is to assess whether there has been an interference with the right by the Contracting State and/or whether the Contracting State has unfulfilled positive obligations (Stage 2).³¹³ This is discussed further below.

Article 14 ECHR provides for the principle of non-discrimination. This principle is, not, however, a free-standing principle. It applies only in relation to rights protected by other Convention provisions as it prohibits discrimination only with regard to the 'enjoyment of the rights and freedoms' set forth in the ECHR. Protocol No. 12 of the ECHR does, however, contain a general and free-standing non-discrimination principle, which applies to any legal right, including sex, race, colour, language, religion, national or social origin, and birth.

(b) **Evolutionary interpretation of the ECHR**

The interpretation of the rights and the standards provided by the ECHR is not static. Evolutionary (or dynamic) interpretation is a tool of interpretation which provides the ECtHR with the necessary degree of flexibility to ensure the realisation of the rights guaranteed by the ECHR and the Protocols.

310 Proportionality is a doctrine that places limits on legislative power. It requires that before a law will be permitted to intrude into matters of great human importance – like reproduction – the objective of the law must be sufficiently weighty and the means employed by the law must be the only or the least intrusive means of achieving the objective.

311 For a detailed overview, see I. Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights* (Council of Europe human rights handbooks, Council of Europe Strasbourg 2012).

312 For more information on the stages and approach, *ibid.*

313 *Ibid.*, 10-11.

There are three governing themes behind the Strasbourg Court's evolutive approach to interpretation of the ECHR, which have been developed in four leading decisions: *Golder v. the United Kingdom*,³¹⁴ *Tyrer v. the United Kingdom*,³¹⁵ *Marckx v. Belgium*,³¹⁶ and *Airey v. Ireland*.³¹⁷ The first is that of a purposive rather than a literal construction of the language used in the ECHR. Thus in *Golder*, the Strasbourg Court relied upon Article 31 Vienna Convention on the Law of Treaties 1969 (although at that time it was not yet in force) to give priority to the 'object and purpose' of the ECHR. As stated in the preamble to the ECHR, this was '*as governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*'. Access to the judiciary was an essential prerequisite to the rule of law. Hence, in *Golder*, the right of access was 'inherent' in the right to a fair trial under Article 6(1) ECHR. The second idea, articulated in *Tyrer*, is that the ECHR is a '*living instrument*'.³¹⁸ This echoed the words of Lord Sankey, in *Edwards v. Attorney General for Canada*,³¹⁹ when he said that the Constitution of Canada should be seen '*as a living tree capable of growth and expansion within its natural limits*'. The third idea, first articulated in *Airey*, is that the rights protected must be '*practical and effective*' rather than '*theoretical or illusory*'.³²⁰

The ECHR calls not only for the protection of human rights but for their development. As to their development, or '*further realisation*' as the English version of the Convention puts it, this seems a desirable aim. Yet judicial recognition of progressive legal and social trends may spark resistance by some governments. As a result, for some, evolutive interpretation is seen as a symbol of activism or judicial imperialism, even if it can also, in some cases, have as an effect the restriction of the scope of the rights protected by the Convention. Nevertheless, the Strasbourg Court has developed the 'evolutive' character of the ECHR in different ways. Hale refers, in particular, to (a) the interpretation of the autonomous concepts in the Convention, (b) the development of positive obligations, and (c) the narrowing of the margin of appreciation, which are considered below.³²¹

314 21 February 1975, Series A No. 18.

315 25 April 1978, Series A No. 26.

316 13 June 1979, Series A No. 31.

317 9 October 1979, Series A No. 32.

318 See *Tyrer v. United Kingdom*, Application No. 5856/7225 April 1978.

319 [1930] AC 124,136.

320 25 April 1978, Series A No. 26.

321 Baroness Hale's contribution at the seminar 'What Are the Limits to the Evolutive Interpretation of the Convention?', Dialogue between judges, European Court of Human Rights, Council of Europe, 2011.

(c) The autonomous concepts

It stands to reason that, once a state has committed itself to certain minimum standards, it cannot contract out of those by defining the terms used in its own way.³²² Certain key terms must have a common meaning across the *espace juridique* of the ECHR. It also stands to reason that the meaning of those terms can develop over time, in just the same way that domestic understanding of words such as 'family' has developed over time. The Strasbourg Court's case law offers many examples: that unmarried fathers may enjoy family life with their children which is worthy of respect under Article 8;³²³ that homosexuals have as much right to respect for family life as anyone else;³²⁴ or that discrimination under Article 14 may include not only direct but indirect discrimination. These are all examples of applying the language of the ECHR to situations which may not have been contemplated by the original framers, but which are consistent with its underlying principles and purpose. On the other hand, there are concepts which have been developed far beyond an initial literal reading and may not yet have reached their natural limits.³²⁵

(d) Positive obligations

The second area where development (and evolution) can be both beneficial and problematic is in the development of positive obligations. Article 8 ECHR provides a right to respect for an individual's private and family life. Article 8(1) is phrased so as to preclude the State from intervening in a person's family life. Such intervention may, however, be justified under Article 8(2) if the intervention is lawful, has a legitimate aim, and is proportionate. Although the provision is phrased negatively – the State must not intervene – it is well established in the case law of the ECHR that a Contracting State may also have a positive obligation to protect a person's family life. The practical application of Article 8 has become, therefore, a challenging exercise, as it is difficult to try and predict its implementation in socially controversial situations.

Positive obligations under Article 8 ECHR were discussed for the first time in 1979, in *Marckx v. Belgium* (considered below).³²⁶ Then, the Strasbourg Court observed that the word 'respect' contained in the first paragraph of Article 8 suggested the existence of positive obligations. This meant that the ECHR required more of Belgium than simply to refrain from interfering in the actual family life which the mother and child enjoyed: it required the law to recognise when family life exists and creates the circumstances which

322 *Engel and others v. the Netherlands*, where it was held that national laws could define conduct into the concept of a criminal charge in Article 6, but not out of it; 8 June 1976, Series A No. 22.

323 *See, among others, Keegan v. Ireland* (1994) 18 EHRR 342.

324 *See Schalk and Kopf v. Austria* (Application No. 30141/04) and *Dudgeon v. the United Kingdom*, 22 October 1981, Series A No. 45.

325 Baroness Hale's contribution at the seminar 'What Are the Limits to the Evolutive Interpretation of the Convention?', Dialogue between judges, European Court of Human Rights, Council of Europe, 2011.

326 (1979-1980) 2 EHRR 330 (Judgment of 13 June 1979).

will allow it to develop. Since its judgment in *Tyrer v. the United Kingdom*,³²⁷ the Court has frequently reiterated that the Convention is a living instrument which must be interpreted ‘in the light of present-day conditions’.

(e) The margin of appreciation and European consensus

The rationale of the margin of appreciation doctrine is that, in principle, the national authorities are best placed to assess the necessity and appropriateness of restrictions and limitations provided by national law.³²⁸ Not only do they have better access to factual information, but they are also generally in a better position to evaluate how a certain national measure or decision relates to national constitutional rules and traditions, particularly when it comes to policies on debated moral issues. According to the case law of the Strasbourg Court, there are three realms that in principle fall within the margin of appreciation of the national authorities and the domestic courts in particular, namely, questions of (i) fact, (ii) domestic law,³²⁹ and, more controversially, (iii) how wide the margin of appreciation should be when it comes to interpreting the provisions of the ECHR.³³⁰

Where there is no consensus within the Contracting States on either the relative importance of the interest at stake or the best means of protecting it, particularly where the case raises sensitive moral issues, the margin will usually be wider, whereas if the presence of a policy is perceived as ‘common’ or ‘European’, it will have the effect of narrowing the margin of appreciation.³³¹ In most cases, when exercising their margin of

327 Application No. 5856/72.

328 For more on this argument, see, e.g. D Spielmann, ‘Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (CELS Working Paper Series, 2012).

329 Often there is an indirect assessment. See *Klaas v. Germany*, 22 September 1993, at 29, Series A No. 269, para. 29.

330 For Gerards: ‘[...] although the margin of appreciation doctrine is potentially a very important doctrine for the Court, the Court’s application of the doctrine has made it into a rather meaningless and empty rhetorical device without any real added value (section II). This is different for the Court’s use of incrementalism, which increasingly seems to have replaced the use of the margin of appreciation doctrine as an instrument to deal with the need to reconcile European standard setting with national diversity’. See J. Gerards, ‘Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights’, in M. Claes and M. De Visser (eds), *Constructing European Constitutional Law* (Oxford, Hart 2014).

331 The dissenting judges in *X and Others v. Austria*, Application No. 19010/07 criticise the manner in which the majority employed the European consensus argument. To quote from the dissenting opinion: ‘15. In fact, the method in question has the inescapable effect of disregarding a clear trend whereby the great majority of the States Parties currently do not authorise second-parent adoption for unmarried couples in general, still less for unmarried same-sex couples. To say that this is of no relevance for the purposes of the present case is, in our opinion, to take an unduly technical – and hence reductive – view of the situation Europe-wide. While the Court has and must have a sound technical grasp of issues, it must not lose sight of the major trends which are clearly in evidence across our continent, at least in the current circumstances. Furthermore, and moving from methodology to terminology, should we always adhere to the somewhat restrictive notion of “consensus”, which is rarely encountered in real life? Would it not be more appropriate

appreciation, Contracting States are called upon to strike a balance between competing private/public interests and Convention rights. The margin of appreciation doctrine embodies the proportionality principle.³³²

To quote Judge Malinverni's dissenting opinion in *Lautsi v. Italy*:

Whilst the doctrine of the margin of appreciation may be useful, or indeed convenient, it is a tool that needs to be handled with care because the scope of that margin will depend on a great many factors: the right in issue, the seriousness of the infringement, the existence of a European consensus, etc. The Court has thus affirmed that 'the scope of this margin of appreciation is not identical in each case but will vary according to the context [...]'. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned' [*Buckley v. the United Kingdom*, 25 September 1996, § 74, Reports of Judgments and Decisions 1996-IV].³³³

The concept of European consensus in the case law of the ECtHR may therefore be defined as a general agreement among the majority of Contracting States about certain rules and principles identified through comparative research of national, regional, and international law and practice.³³⁴ European consensus is often approached as a '*mediator between dynamic interpretation and the margin of appreciation*'.³³⁵ This conclusion must be understood in the context that if the law of the respondent State diverts from European consensus, it does not automatically mean that the state in question is in violation of the ECHR.

4.11.3 Examples from the case law of the Strasbourg Court

As discussed in Chapter Three, many, perhaps most, of the resident Europeans who engage in inter-country surrogacy (and cross-border reproductive travel more broadly) do so because of laws that bar or restrict their access to surrogacy and assisted reproduction in their home countries. As considered in Chapter Three and further below, the case law of Strasbourg Court might play a role in dismantling the totality of surrogacy-prohibitive

and simpler to speak in terms of a "trend"? These observations lead us into a more detailed examination of the current state of international law in this regard'.

332 See, among others, S. Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' [2010] UCL Human Rights Review 1-14; P. Lambert, 'La Cour européenne des droits de l'homme à l'épreuve de quelques critiques...au fil du temps' [2010] Revue trimestrielle des droits de l'homme 5-18.

333 *Lautsi v. Italy*, Application No. 30814/06 ECHR at para. 1.

334 K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] Public Law 534, 548.

335 *Ibid.*

laws such that the consequences of a surrogacy arrangement lawfully undertaken abroad may create legal consequences.

The relevance of the ECHR on the topics of parentage and citizenship (and the Strasbourg Court's influence on national law) is described below. Given the important role of the Strasbourg Court and its potential for issue raising and standard setting in the Contracting States, it is necessary to consider the areas of protection and standards offered by the ECHR and to assess these standards in the context of inter-country surrogacy.

(a) In protecting family life

When it comes to family life, the case law broadly indicates that two types of obligation stem from Article 8 ECHR: the first is to give legal recognition to family ties and the second is to act to preserve family life.³³⁶ It is not the intention of this thesis to provide an extensive analysis of the case law.³³⁷ What is important for this subject matter is that the concept of family life for the purposes of engaging Article 8 is a developing one. Indeed, van Bueren maintains that the Article 8 case law on the meaning of family life '*has generally been dynamic and progressive*', taking into account social change and '*in this way, paradoxically acting as a catalyst for further change*'.³³⁸ What follows is an overview of the Article 8 obligations the Contracting States bear in the following areas: the nature of family life, in recognising family ties, in recognising social parents, the right to know one's origin and to an identity, in relation to medically assisted procreation services, in relation to adoption, in relation to social parenting, and in relation to surrogacy.

(b) The nature of family life and private life

The first point that needs to be clarified when dealing with the family life component of Article 8 is the meaning given to the word 'family'.³³⁹ The notion used by the Strasbourg Court has developed over time in line with the changing and evolving understandings and attitudes of European society. The Court has said in its case law that the notion of family life in Article 8 is not confined solely to families based on marriage and may encompass

336 See, generally, the comprehensive work of U. Kil Kelly, *The Child and the ECHR* (Aldershot: Ashgate 1999); 'Children's Rights: a European Perspective' [2004] 4 Judicial Studies Institute Journal 68-95; and 'Protecting Children's Rights under the ECHR: The Role of positive Obligations' [2010] 61 Northern Ireland Legal Quarterly 245; see also I. Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights* (Council of Europe human rights handbooks, Council of Europe Strasbourg 2012), 63, 64, and 68 to 72.

337 Each of the judgments and a significant selection of decisions and reports are published in the HUDOC database, available at: <<http://hudoc.echr.coe.int/>>.

338 G. van Bueren, *Child Rights in Europe* (Council of Europe, Strasbourg: 2007), 118.

339 I. Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights* (Council of Europe human rights handbooks, Council of Europe Strasbourg 2012), 27 and 68-72.

other *de facto* relationships.³⁴⁰ When deciding whether a relationship may be said to amount to family life, a number of factors may be relevant, including whether the couple lives together, the length of their relationship, and whether they have demonstrated their commitment to each other by having children together or by any other means. The Court's flexible approach takes into account the variety of family arrangements across the Contracting States. *De facto* family life, therefore, receives recognition under the ECHR on an equal basis with formally established ties. As the Court decides on the existence of family life on a case-by-case basis, it is not possible to enumerate each of the relationships which constitute family life. This means that it should not be presumed by decision-makers that certain family relationships are incapable of giving rise to protected family life for the purposes of Article 8 ECHR.

Should a situation fall outside of the notion of family life, it might very well enjoy the protection of Article 8 from the perspective of 'private life'. In *Niemietz v. Germany*, the ECtHR expressly refused to define private life, stating that it would be neither possible nor necessary to do so.³⁴¹ But the Court in a later decision made clear that the right to respect for private life certainly comprises the right to establish and develop relationships with other human beings.³⁴² Private life as protected by Article 8 is a broad concept, encompassing personal, social, and economic relations, moral and physical integrity, personal identity including sexuality, personal information, and personal or private space.³⁴³ The distinction between private and family life will, it seems, depend on the circumstances of the particular case. As discussed below, the differentiation does not lend itself to a precise definition, and it is questionable whether such a distinction is appropriate when the Court is considering families with the emphasis being to look at the family unit as a whole. Many Article 8 cases will combine both family and private life aspects.

(c) In recognising and preserving family ties

The Strasbourg Court has recognised on a number of occasions the special importance of parental attachments to a child's healthy development. In dealing with a complaint about the effect on family life of certain aspects of the then Belgian 'illegitimacy' laws, the Strasbourg Court in *Marckx v. Belgium*³⁴⁴ clarified that when the state determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner to allow those concerned to lead a normal family life. As envisaged by Article 8 ECHR, respect for family life implies,

340 One example of such progress in motion relates to the legal status of homosexual couples in Europe.

341 Application No. 13710/88, 16 EHRR 97, para. 29 (Judgment of 16 December 1992).

342 *Botta v. Italy*, Application No. 21439/93, 26 EHRR 241, para. 32, referring to *Niemietz v. Germany*.

343 I. Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights* (Council of Europe human rights handbooks, Council of Europe Strasbourg 2012), 60.

344 Application No. 6833/74 (Judgment of 27 April 1979).

in the Court's view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family. Although the state has a 'choice of means' in this regard, a law that '*fails to satisfy this requirement*' violates Article 8(1) '*without there being any call to examine it under paragraph 2*'.³⁴⁵ Applying this principle to the applicants' situation under Belgian law, the ECtHR found that the requirement that the applicant mother had to choose between taking steps to ensure legal recognition with her daughter and being able fully to give or bequeath property to her was '*not consonant with "respect" for family life*', rather it impeded the development and realisation of such life. Significantly, the Strasbourg Court held that the legal situation in which the daughter was placed also resulted in '*a lack of respect for her family life*' under Article 8. Through its application of the positive obligations identified in the *Marckx* case, the ECtHR recognised the right to legal recognition of biological family ties as a part of respect for family life and extended that approach to children – as rights holders – as well as their parents. On that reading, it is arguable that in the *Marckx* decision, the ECtHR went even further than the protection guaranteed by Articles 7 and 8 CRC, which protect the child's right to identity but do not specify what that means or how that right is to be realised.

The Court continued with this emphasis on the child's legal status in the case of *Johnston v. Ireland* in 1986.³⁴⁶ Here, the Strasbourg Court came to consider the legal status under Irish law of a child, Nessa, born to parents who were unable to marry because her father remained married as, at the time, divorce was prohibited in Ireland. As a result of her 'illegitimate' status, Nessa suffered disadvantages (e.g. she could not be adopted by her parents, legitimated by their subsequent marriage, nor could her father be appointed her guardian) and together with her parents, all three applicants complained of a violation of their rights under Article 8 ECHR. Although the Strasbourg Court dismissed the claim that the applicant parents' inability to marry violated their ECHR rights, the Court agreed that Nessa's 'illegitimate' status under Irish law was detrimental to her. The ECtHR began by finding that all three applicants enjoyed family life within the meaning of Article 8 notwithstanding that the parents were not married.³⁴⁷ It then considered whether 'respect for family life' imposed a positive obligation on the state to improve the child's legal situation.³⁴⁸ In short, the Court held that it did, and, in reaching this conclusion, it made a distinction between the impact of Irish law on her parents (which was not incompatible with Article 8) and on the child (which was).³⁴⁹ In its judgment, the Court reiterated the *Marckx* principle that "*respect" for family life [...] implies an obligation for the State to act in a*

345 (1979-1980) 2 EHRR 330 (Judgment of 13 June 1979).

346 *Johnston v Ireland* (1986) 9 EHRR 203.

347 *Ibid*, para. 72.

348 *Ibid*, para. 74.

349 *Ibid*, para. 75.

manner calculated to allow these ties to develop normally'.³⁵⁰ It then went on to find that *'in the present case the normal development of the natural family ties between the first and second applicants and their daughter requires [...] that she should be placed, legally and socially, in a position akin to that of a legitimate child'*.³⁵¹

Notwithstanding its conclusion that the Convention did not require Ireland to permit divorce, the Court was concerned about the impact of the lack of divorce on the child's legal situation *'seen as a whole'*.³⁵² In particular, it held that an examination of Nessa's situation revealed that it differed considerably from that of a child born in wedlock and that, without the means to eliminate or reduce these differences, the absence of an appropriate legal regime to reflect Nessa's family ties amounted to a failure to respect her family life.³⁵³ Although the Court did not find that the obligation to respect the family life of the adults required that they be placed in a position akin to that of a married couple, the ECtHR took the important step of recognising the impact of the child's legal status not just on her rights but on those of her parents. In particular, it held that the *'close and intimate relationship between the third applicant and her parents is such that there is of necessity also a resultant failure to respect the family life of each of the latter'*.³⁵⁴ So, the absence of a legal regime reflecting Nessa's natural family ties amounted to a failure to respect the family life of all three applicants, in violation of Article 8. In adopting this approach, the Court demonstrated its awareness of the impact on private family relationships of the State's failure to grant them legal and public recognition. In this sense, *Marckx* and *Johnston* represented important milestones in the recognition of relationships between parents and their children outside of the more 'traditional' – read 'nuclear' – setting.

Moreover, the Court has developed this case law in a number of cases about paternity beginning with *Kroon v. the Netherlands* in 1994.³⁵⁵ In *Kroon*, the applicants – again a child and her parents – complained that the law operated so as to undermine their natural relationship, a situation which they considered in breach of Article 8 ECHR. In particular, they complained that the irrebuttable presumption that the applicant's husband was the father of her child frustrated the child's father from being so recognised and thus breached all three applicants' Article 8 rights. The Court agreed and, in reaching this conclusion, it held that respect for family life requires *'that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone'*.³⁵⁶

³⁵⁰ *Ibid.*, para. 45.

³⁵¹ *Ibid.*, para. 74.

³⁵² *Ibid.*, para. 75.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ (1995) 19 EHRR 263.

³⁵⁶ (1995) 19 EHRR 263, para. 40.

*Krušković v. Croatia*³⁵⁷ should also be referenced. The Court held that the denial of the right to be registered as a father of a genetic child, born out of wedlock, lead the Court to the conclusion that *'the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for his private and family life'*.

The Strasbourg case law does, however, leave the door open to exceptions, which when read together present more of a cautious approach. *Chavdarov v. Bulgaria*³⁵⁸ concerned the inability of a genetic father to establish in law his paternity of children born to a married woman with whom he had been cohabiting. The children continued to live with the genetic father after the mother left the family home. In conflict with its judgment in *Kroon*, the Court, after having taken into account the margin of appreciation enjoyed by the Contracting State in regulating paternal filiation, an area in which *'various moral, ethical, social or religious considerations'* apply, noted the lack of a Europe-wide consensus on whether domestic legislation should enable the genetic father to contest the presumption of a husband's paternity. It concluded that, as *'respect for the children's legitimate interests had been secured by the domestic legislation, [...] the fair balance between the interest of society and that of the individuals concerned had not been breached in this case'*. The Court emphasised that, although Mr Chavdarov was unable to bring an action to challenge the three children's paternal filiation, domestic legislation did not deprive him of the possibility of establishing a paternal link in their respect or of overcoming the practical disadvantages posed by the absence of such a link (in particular, he could have applied to adopt the children or asked the social services to have them placed under his responsibility as a close relative of abandoned underage children). Since it had not been shown that he had availed himself of those possibilities, the Court could not hold the State authorities responsible for the applicant's own passivity. The children's legitimate interests had also been secured by domestic legislation.

The Court has rejected claims against the UK that unmarried fathers' relationships with their genetic children must be recognised³⁵⁹ holding that: *'It is true that under the Children Act 1989 married fathers have parental responsibility automatically, while unmarried ones need to acquire it in accordance with the provisions of the Act. However, the Court has considered that the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family based unit (the McMichael v. United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 58, § 98)'*. The law in the UK has now changed. It can, however, be summarised that the Court has held that there exists an objective and reasonable justification for a difference in treatment between married and unmarried

357 Application No. 46185/08 (Judgment of 21 June 2011).

358 Application No. 3465/03.

359 *B v. UK* Application No. 39067/97.

fathers with regard to the automatic acquisition of parental rights. The ECtHR appears to distinguish unmarried fathers who are committed to their children and those who do not appear to want such a close relationship. It follows from the case law that provided an unmarried father can demonstrate sufficient interest or commitment, then it is not necessary to prove that his cohabitation with the mother is continuing at the time of the child's birth³⁶⁰ or even that he has cohabited with the mother at all.³⁶¹

The case of *X, Y, and Z v. the UK*³⁶² concerned a female-to-male transsexual (X), his partner (Y), and their child (Z) born by donor insemination. X, Y, and Z claimed that the failure to recognise X as the child's legal father on her birth certificate due to his transsexual status amounted to a failure to respect their rights under Article 8. The Court's first conclusion was that the applicants enjoyed family life within the meaning of Article 8. The Strasbourg Court then turned to consider whether the applicants' treatment showed the necessary respect for that family life. The Court referenced the principles set out in the *Marckx* and *Johnston* cases that where the existence of a family tie with a child has been established, the state must act in a manner to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his or her family.³⁶³ But, the Court then departed from its approach on the basis that this case concerned '*different issues, since Z was conceived by AID and is not related, in the biological sense, to X, who is a transsexual*'.³⁶⁴

Although it did not rule out that the respondent State's positive obligation was engaged in this context, it gave more careful consideration to the scope of that obligation. According to the Court, the facts of the case required a different approach to previous cases, i.e. one that involved weighing up the arguments for and against the legal recognition sought by the applicants in order to strike a fair balance between '*the competing interests of the individual and of the community as a whole*'.³⁶⁵ With regard to the latter, the Court noted that there was a community interest in having a '*coherent system of family law which places the best interests of the child at the forefront*'.³⁶⁶ However, the Court did not articulate how protection of this '*community interest*' would be served by denying the parties' recognition of the family life that had been found to exist between them.³⁶⁷ Kilkelly notes that in contrast to its findings in earlier case law – notably its decision in the *Marckx*, *Johnston*, and *Kroon* cases, which had identified the important advantages that flow from the legal recognition

³⁶⁰ *Keegan v. Ireland* (1994) 18 EHRR 342.

³⁶¹ *Lebbink v. the Netherlands* (2004) 40 EHRR 18 (father regularly visited his child and baby-sat).

³⁶² *X, Y, and Z v. the UK* (1997) 24 EHRR 143.

³⁶³ U. Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' [2010] 61 Northern Ireland Legal Quarterly 245, 251.

³⁶⁴ Note 362, para. 43.

³⁶⁵ *Ibid.*, para. 41.

³⁶⁶ *Ibid.*, para. 47.

³⁶⁷ *Ibid.*

of family ties – the Strasbourg Court preferred instead to emphasise the measures that the applicants themselves could take to alleviate the difficulties they faced.³⁶⁸ For example, in respect of the issues of succession and legal recognition, the Court noted that their practical impact could be mitigated by X executing a will and X and Y applying for a joint residence order, which would confer parental responsibility. While it accepted that it might be distressing for the child not to have her father's name on her birth certificate, it considered that the applicants were in a similar position to any other family where, for whatever reason, the person who performs the role of the child's 'father' is not registered as such.³⁶⁹ With respect to the applicants' concerns about the effect on the child of the position, the Court noted that X was not prevented in any way from acting as the child's father in the social, day-to-day, sense. The Court in *X, Y, and Z* appeared undecided about the impact of the failure to ensure respect for the child's family life. According to the Court, it was impossible to predict '*the extent to which the absence of a legal connection between X and Z will affect the latter's development*', and it went on to conclude that '*there was no certainty as to how to best protect the best interests of the child in such cases*'.³⁷⁰ In conclusion, the Court held that '*given that trans-sexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States*', Article 8 could not be taken to imply '*an obligation [...] to recognise as the father of a child a person who is not the biological father*'. Accordingly, the fact that the law of England and Wales at that time did not allow for legal recognition of the relationship between X and Z did not amount to a failure to respect family life within the meaning of Article 8.³⁷¹ As regards the objection that the child's sense of personal identity and security within her family would be affected by the fact that the person who actually assumed the role of father was not legally recognised as her father, the Court pointed out that the person concerned was not prevented in any way from acting as the child's father in the social sense: he lived with his child, provided emotional and financial support to her, and was free to describe himself to her and others as her 'father' and to give her his surname. Furthermore, together with the child's mother, he could apply for a joint custody order in respect of the child, which would automatically confer on him parental responsibility for her in English law.

There are a number of significant features to this judgment which are of relevance also in the context of surrogacy. In refusing to find that there was a positive obligation to recognise the right of a transsexual to have his name entered on the birth certificate of the child born to him and his partner, the Court was influenced by the absence of a European consensus. This is perhaps not surprising given that, at the time of the judgment, its other

368 U. Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' [2010] 61 Northern Ireland Legal Quarterly 245, 252.

369 Note 362, para. 49.

370 *Ibid*, para. 51.

371 *Ibid*, paras. 52-3.

case law in this area also relied heavily on the lack of consensus that was seen to permeate the law affecting transsexuals.³⁷² Related to this, as Kilkelly observes, is the second:

Notable feature of the Court's judgment, i.e. that the Court clearly considered that the case concerned how the law should treat transsexuals, rather than how it should recognise children's family ties. In this way, for example, the Court's view that there are risks associated with recognising as the father of a child a person who is not the biological father was not made in the context of donor-supported assisted human reproduction - where such points could validly be made - but rather against the backdrop of the father's status as a transsexual.³⁷³

This is reinforced by the Court's dismissal of the disadvantages endured by the child concerned – whose family had no means available to alleviate these disadvantages – and its encouragement to her that she should not feel stigmatised by her legal status. In addition, the judgment made clear that notwithstanding that a relationship may constitute family life, the Article 8 positive obligation to respect that family life applies only to those enjoying ties of a genetic as opposed to a social nature (although they can of course, and indeed may have to, enjoy both elements). While the Court may have been able to draw support for its judgment in *X, Y, and Z* from the lack of European consensus on the issue at that time, the change in the Court's case law in the context of transsexuals, signalled by *Goodwin v. the UK* in 2002,³⁷⁴ leads to the conclusion that this approach does not have solid foundations.

Notwithstanding these weaknesses in the Court's approach, the Court's concern it expressed in those judgments with regard to the best interests of the child should be noted. The definition of the family under the Convention is inclusive and based on the social and emotional realities of family ties (or to put it another way, it does not rely upon definitions of the family found in national laws). In particular, it implicitly recognises that a range of relationships may be important to a child's development and not necessarily only the relationship with his or her genetic parents. Also, given that the Convention is a living instrument, to be interpreted in present-day conditions (the limits of which are considered below), the Contracting State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8 ECHR, must necessarily take into account developments in society and changes in the perception of social, civil status, and

372 U. Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' [2010] 61 Northern Ireland Legal Quarterly 245, 252.

373 *Ibid.*, 253. For a review of these cases, see U. Kilkelly, 'Article 8: The Right to Respect for Private and Family Life, Home and Correspondence' in D. Harris *et al.*, *Law of the European Convention* (Oxford 2009) 385-6.

374 *Goodwin v. UK* (2002) 35 EHRR 447.

relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life.

(d) In relation to social parenting

As suggested above, genetic ties are not the only factor in establishing and maintaining family life. In a number of cases involving unmarried fathers and their children, the ECtHR's approach has suggested that a genetic relationship alone is normally insufficient to establish family ties and that, in most cases, social ties are needed. In *Keegan v. Ireland*,³⁷⁵ the applicant complained of an interference with his family life because his daughter (born outside of wedlock) had been placed for adoption without his knowledge or consent. In recognising the existence of a *de facto* family in this case, the ECtHR observed that the relationship between the applicant and the child's mother lasted more than two years, during one of which they cohabited. The Strasbourg Court also observed that the conception was the result of a deliberate decision, and the couple had planned to get married. These factors, the ECtHR held, gave their relationship the necessary hallmark of family life.

In *Lebbink v. the Netherlands*,³⁷⁶ the ECtHR highlighted the importance of evidence of a caring paternal role before Article 8 is engaged:

The existence or non-existence of 'family life' for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.³⁷⁷

Consequently, while the ECtHR appears well disposed towards recognising *de facto* relationships bound by genetic ties (even in the absence of cohabitation), some evidence of a real and constant relationship or the desire to achieve family life will normally be needed before such relationships are afforded the protection of Article 8. The clear message here is that – viewed from the perspective of a child's best interests – parenting is an important social (and not merely genetic) function, which the ECtHR recognises. Although the above cases demonstrate that the ECtHR attaches considerable weight to genetic ties when deciding if family life exists between parent and child, this is by no means the sole charac-

375 18 EHRR 342 1994. By the time these proceedings had terminated, the scales concerning the child's welfare had tilted inevitably in favour of the prospective adopters.

376 Application No. 45582/99 (Judgment of 1 June 2004).

377 *Ibid.* para. 36.

teristic of *de facto* family relations. In *Nylund v. Finland*,³⁷⁸ the ECtHR held, in contrast to its decision in *Keegan*, that there was no family life between a man and a child whom he had never met and with whom he had established no emotional bonds or connection, even though he had been engaged to the child's mother when the child was conceived. The ECtHR undoubtedly considered it significant that the mother had remarried before the child's birth and had denied Mr Nylund's paternity. The ECtHR held that it was '*justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a genetic fact*'. Reference to the decision to *Chavdarov* (above) must also be made. These cases point to the ECtHR's broad acceptance that it may not necessarily be in a child's best interests when defining 'family life' to prioritise genetic parenting to the exclusion of social parenting.

In the case of *Anayo v. Germany*,³⁷⁹ the Strasbourg Court held, unanimously, that there had been a violation of Article 8 ECHR. The case concerned the German courts' refusal to grant the applicant access to his genetic children with whom he had never lived. For about two years, he had a relationship with a married woman, Mrs B, who had three children with her husband. In December 2005, four months after leaving Mr Anayo, she gave birth to twins. Mr Anayo is the genetic father. Mrs B's husband is their legal father. Mr and Mrs B, the legal parents, repeatedly refused requests by Mr Anayo, both before and after the twins' birth, to be allowed contact with them. The Court found that the domestic courts' decisions to refuse Mr Anayo contact with his children constituted an interference with his rights under Article 8. It was true that, given that he had never cohabited with the twins and had never met them, their relationship did not have sufficient constancy to be qualified as existing 'family life'. However, the Court had previously found that a desire for family life might fall within the ambit of Article 8 where the fact that family life had not been established was not attributable to the applicant. That was the case with Mr Anayo, who had not had any contact with the twins solely because their mother and legal father refused his requests. Mr Anayo had demonstrated a genuine interest in the children by expressing his wish to have contact with them, both before and after their birth, and by speedily bringing access proceedings to the courts. Further, although he and Mrs B had never cohabited, the children had emanated from a relationship which, lasting some two years, was not merely haphazard. Even assuming that his relations with his children fell short of family life, they concerned an important part of Mr Anayo's identity and thus his private life for the purpose of Article 8.

The interference with Mr Anayo's private life had been in accordance with German law, but was it necessary in a democratic society and did it pursue a legitimate aim? The Court was aware of the fact that the German courts' decision to deny Mr Anayo contact

378 Application No. 27110/95 (Admissibility decision of 29 June 1999).

379 Application No. 20578/07 (Judgment of 21 March 2011).

with his children was aimed at complying with the legislator's will to give existing family ties precedence over the relationship between a genetic father and a child. The Court accepted that those existing relations equally warranted protection. A fair balance would thus have had to be struck between the competing rights under Article 8 not only of two (legal) parents and a child but of several individuals concerned – the mother, the legal father, the genetic father, the married couples' children, and the children who emanated from the relationship of the mother and the genetic father. The Court was not satisfied that the domestic courts had fairly balanced the competing interests involved. In particular, they had failed to give any consideration to the question whether, in the particular circumstances of the case, contact between the twins and Mr Anayo would be in the children's best interest. This case opens the door to greater recognition for unmarried fathers or co-parents where they have been denied the opportunity to establish a relationship, and thus family life, with the child.

Provided there is a caring relationship between the adult and the child, then it is clear that the absence of a genetic link is not fatal to the engagement of Article 8 rights. In summary, the ECtHR recognises *de facto* family ties in its case law and has extended the meaning of family life under the ECHR beyond marriage and genetic relationships to certain committed relationships. Such an approach suggests that the definition of the family under the ECHR is based on the social and emotional realities of family ties, including the intended desire to establish such ties (and the failure to do so is not attributable to the applicant), and that it does not rely upon definitions of the family found in national laws. In particular, it implicitly recognises that a range of relationships may be important to a child's development and not necessarily only the relationship with his or her genetic parents. The ECtHR has noted that '*the institution of the family is not fixed, be it historically, sociologically or even legally*'.³⁸⁰ It has also held that the '*the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties*'.³⁸¹ This line of reasoning clearly has the potential to be extremely important for children being raised in nontraditional units (and for LGBTI families³⁸²). Unfortunately, however, although the case law of the ECtHR offers recognition to diverse family forms, it has thus far offered insufficient guidance to Contracting States on respecting the family rights of such children. An examination of the ECtHR's judgments to date shows that its approach to these families has been uneven and that children raised in such family units have been excluded from equal enjoyment of and respect for their family rights.

380 *Mazurek v. France* Application No. 34406/97 (Judgment of 1 February 2000), para. 52.

381 *K and T v. Finland*, para. 150.

382 See, generally, L. Hodson, 'The Rights of Children Raised in Lesbian, Gay, Bisexual or Transgender Families: A European Perspective' [2009] ILGA Europe.

(e) The right to know one's origins and the right to an identity

States' laws concerning children's rights to know even their genetic origins let alone their parents' identity vary significantly.³⁸³ At one end of the spectrum is Sweden, which gives children of sufficient maturity the right to know their genetic origins.³⁸⁴ In the Netherlands, the Supreme Court has ruled that a general personality right includes knowing the identity of one's parents and that this right is protected under Dutch law to the extent of overriding the mother's privacy rights.³⁸⁵ In Germany, however, where a right to know one's parentage can also be derived from the general personality rights said to be conferred to the Basic Law,³⁸⁶ the Federal Constitutional Court has taken a more cautious approach, ruling³⁸⁷ that the child's rights to be informed by a mother as to the father's identity has to be balanced against the mother's personality rights. In France, mothers are permitted to give birth anonymously,³⁸⁸ although they must be told of the importance of children knowing their identity and be informed of their right subsequently to reveal their identity.³⁸⁹ Unless the mother changes her mind, her identity cannot be revealed.³⁹⁰ In England and Wales, in addition to the possibility of bringing proceedings to establish parentage, it is now established that there is power to order a parent to disclose the truth about a child's parentage provided at any rate it is in the child's interests to do so.³⁹¹ Many other national laws lie somewhere between these positions.

The ECtHR has an established set of case law providing that Article 8 ECHR protects a right to identity and personal development.³⁹² Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 ECHR. These standards are of equal relevance to surrogate-born children.

In *Gaskin v. UK*,³⁹³ the Strasbourg Court stated the guiding principle governing access to information about one's origin: '*everyone should be able to establish details of their*

383 See N. Lowe, 'A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation', 21 September 2009, CJ-FA (2008) 5.

384 Act on Genetic Integrity (2006: 351) Ch. 6 § 5 and Ch. 7 § 7. Note also the Lithuanian Civil Code 2000, Article 3.161(3), which provides that a child has a right to know his or her parents unless that would be prejudicial to the child's interest or where the law provides otherwise.

385 HR 15 Ap 1994 NJ 1994 608.

386 *I.e.* derived from Article 2, para. 1 in combination with Article 1.

387 1 BVR *Neue Juristische Wochenschrift* (NJW 1997) 1769.

388 By Article 316 of the Civil Code.

389 Article L 222-6 of the Code de l'action sociale et des familles.

390 See Article L 147-6.

391 See, respectively, *Re F (Paternity: Jurisdiction)* [2007] EWCA Civ 873, [2008] 1 FLR 225 and *Re J (Paternity: Welfare of Child)* [2006] EWHC 2837 (Fam), [2007] 1 FLR 1064.

392 See, for example, *Bruggeman and Scheuten v. West Germany* (1981) EHRR 244; *Niemietz v. Germany* (1992) 16 EHRR 97; *Goodwin v. the UK* (2002) 35 EHRR 18; *I v. the UK* Application No. 25680/94; *Pretty v. the UK* (2002) 35 EHRR 1; *Von Hannover v. Germany* Application No. 59320/00.

393 (1989) 12 EHRR 36.

identity as individual human beings’. The child’s right to an identity emerged in ECtHR case law in 2002 in the case of *Mikulic v. Croatia*.³⁹⁴ Here, the applicant child complained that the respondent State had failed to fulfil its positive obligation to respect her private life under Article 8 ECHR because she had been unable to ascertain the details of her identity. Under Croatian law, the only mechanism available to the applicant, who wished to establish her paternity, was to take a civil action against her putative father. However, as nothing compelled him to undergo DNA testing, he refused to attend over a period of three and a half years, after which time the first instance court relied on his non-attendance and the evidence of the child’s mother to declare him the father. The appellate court overturned this decision having found this evidence to be inconclusive. When the case came to Strasbourg, the ECtHR acknowledged the importance to the applicant of obtaining accurate information about her identity and also accepted that states approach such situations in different ways. Nonetheless, it found that as there were no effective means to oblige the putative father to undergo DNA testing, this, together with the absence of alternative means available to the applicant to establish her identity, resulted in a violation of Article 8. In conclusion, the Court noted that:

In determining an application to have paternity established, the courts are required to have regard to the basic principle of the child’s interests. The Court finds that the procedure available does not strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests, and considers that the protection of the interests involved is not proportionate.³⁹⁵

In other words, as Kilkelly notes, the inefficiency of the national courts had left the applicant in a state of prolonged uncertainty as to her personal identity, which meant that the national authorities had failed to take the necessary steps in sufficient time to respect her private life.³⁹⁶ There is emphasis here on the measures that states must take to ensure effective and timely protection of the applicant’s private life, of which identity is an integral part. The Strasbourg Court made it clear that the child’s best interests was an important factor in determining an application for the establishment of paternity. In its assessment, the Court relied on the identity provisions of the CRC and the Article 3 CRC standard which requires that in all matters affecting the child, the child’s best interests must be considered as a primary consideration.

³⁹⁴ Application No 53176/99.

³⁹⁵ *Ibid*, para. 65.

³⁹⁶ U. Kilkelly, ‘Protecting Children’s Rights under the ECHR: The Role of Positive Obligations’ [2010] 61 Northern Ireland Legal Quarterly 245, 254.

In *Odièvre v. France*,³⁹⁷ the Court was asked to scrutinise French rules governing anonymous birth, which prevented the applicant, who was put into public care due to her mother's wish to remain unknown, from obtaining information about her birth parents. Having learnt about the existence of her natural brothers, the applicant applied for disclosure of confidential information concerning her birth and permission to obtain copies of any documents, public records, or full birth certificates. She could not obtain any information as, in line with national legislation at that time, an application for disclosure of details identifying the natural mother was inadmissible if confidentiality was agreed at birth. The Court, faced for the first time with an application of that kind, had to reconcile a number of competing interests. In judging the complaint, the Court noted that although most of the Contracting States did not have legislation comparable to that applicable in France, which prevented parental ties ever being established with the natural mother if she refused to disclose her identity, some countries did not impose a duty on natural parents to declare their identities on the birth of their children and that there had been cases of child abandonment in various other countries that had given rise to a debate about the right to give birth anonymously. In the light of the diversity of practice among the Contracting States and the fact that children were being abandoned, the Court considered that states had a margin of appreciation to decide which measures were appropriate to ensure the rights guaranteed by the Convention. Importantly, the Court also observed that the applicant's request had not been totally disregarded, as she had had access to non-identifying information about her mother and natural family that had enabled her to trace some of her roots while ensuring the protection of third-party interests. An important submission in this connection was that the amendment of the relevant law in 2002 had introduced the French National Council, which operated as a communication and contact point for both sides should the child subsequently request access to information on his personal history; this meant that, in the opinion of the Court, the applicant had at least secured the prospect of obtaining the desired information through the intermediary of the Council.³⁹⁸ The applicant could use that legislation to request disclosure of her mother's identity, subject to the latter's consent being obtained to ensure that the mother's need for protection and the applicant's legitimate request were fairly reconciled. The French legislation thus sought to strike a balance and to ensure sufficient proportion between the competing interests.

The ECtHR held that France was entitled to preserve the secrecy of the mother's identity. Regarding the conflict of interest, the Court said:

397 (2003) 38 EHRR 871. Considered also in Chapter Three, *see* France.

398 E. Steiner, 'Desperately Seeking Mother – Anonymous Births in the European Court of Human Rights' [2003] 15(4) Child and Family Law Quarterly 425-448.

On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. [...] On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied. In the present case, the applicant's mother never went to see the baby at the clinic and appears to have greeted their separation with total indifference. Nor is it alleged that she subsequently expressed the least desire to meet her daughter. The Court's task is not to judge that conduct, but merely to take note of it. The two private interests with which the Court is confronted in the present case are not easily reconciled; moreover, they do not concern an adult and a child, but two adults, each endowed with her own free will.³⁹⁹

The joint dissenting opinion of seven of the judges highlighted the child's right to an identity.⁴⁰⁰ The dissenting opinion points to the developing case law of Article 8 that is said to include the right to personal development and to 'self-fulfilment' as part of the right to respect for family life. It was strongly stated that the issue of access to information about one's origins concerns '*the essence of a person's identity*' and '*is an essential feature of private life protected by Article 8*'. Being given such access and '*thereby acquiring the ability to retrace one's personal history is a question of liberty, and therefore, human dignity*'. As such, it is stated to lie '*at the heart of the rights guaranteed by the Convention*'.⁴⁰¹

So, notwithstanding the Court's view (expressed in *Gaskin v. the UK*)⁴⁰² that people '*have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development*', it found no violation in this case. Although the birth mother's right is said to concern her personal autonomy, the dissenters found that the different interests involved had not been balanced but instead '*the mother has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance*'. They make clear that, in their opinion, the right to identity – as an essential condition of the right to autonomy and development – is within the inner core of the right to respect of one's private life.

This 'minority' view has been reinforced by the Strasbourg Court's decision in *Godelli v. Italy*.⁴⁰³ This case concerned the confidentiality of information concerning a child's birth and the inability of a person abandoned by her mother to find out about her origins. The applicant maintained that she had suffered severe damage as a result of not knowing her

399 *Ibid.*, para. 44.

400 *Odievre*, joint dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens, and Pellonpää.

401 *Ibid.*, para. 3.

402 (1989) 12 EHRR 36.

403 Application No. 33783/09.

personal history, having been unable to trace any of her roots while ensuring the protection of third-party interests. There is also a general interest at stake; the Italian legislature had sought to protect the mother's and child's health during pregnancy and birth and to avoid illegal abortions and children being abandoned other than under the proper procedure.⁴⁰⁴ The Court held that there had been a violation of Article 8, considering in particular that a fair balance had not been struck between the interests at stake since the Italian legislation, in cases where the mother had opted not to disclose her identity, did not allow, in contrast to *Odievre*, a child who had not been formally recognised at birth and was subsequently adopted to request either non-identifying information about his or her origins or the disclosure of the birth mother's identity with the latter's consent.

In the context of surrogacy, a tentative conclusion might be that there is no general right of access to information held by state bodies and no absolute right to information about genetic or biological origins under Article 8 ECHR. Instead, Article 8 imposes a positive obligation to disclose specific information to individuals in specific circumstances. This positive obligation is said to be inherent in effective respect for private and family life and, where engaged, it requires the establishment of effective and accessible disclosure provisions. A surrogate-born child's right to identifying information under the Convention must be balanced, *inter alia*, with the conflicting right of a genetic or biological (surrogate) parent to remain anonymous. That said, it is possible that Contracting States (the UK, Austria, France, Switzerland, the Netherlands, and Belgium) could be found to be in breach of Article 8 ECHR if it permitted information about surrogates or donors to be unreasonably withheld without carefully balancing the legitimate interests in question. This is considered further below.

(f) In relation to access to medically assisted procreation services

In *S.H. and Others v. Austria*,⁴⁰⁵ the Grand Chamber of the ECtHR held that the Austrian restriction against the use of third-party donor eggs or sperm is not in breach of Article 8 ECHR. In giving judgment, the Strasbourg Court held that while '*the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also*

⁴⁰⁴ *Ibid.*, para. 51.

⁴⁰⁵ Application No. 57813/00. The case was brought by two couples who lodged a request with the Austrian Constitutional Court in 1998 stating that the Austrian Procreation Act, which prohibits the use of eggs or sperm from a donor outside of the marriage, was discriminatory and a violation of their rights to family and private life. Donation using a third party would have been the only way in which the two couples, who wish to remain anonymous, would have been able to conceive children. One woman, known as SH, is infertile because of blocked fallopian tubes. Her husband is also infertile. The other, HE-G, has agonadism, which means that she does not produce eggs. The Austrian Constitutional Court ruled against the couples, however, stating that the interests of the individuals concerned had to give way to the public interest in the well-being of the child and the ethical and social risks of 'commercialisation and selective reproduction'. This decision was overturned by a Chamber of the European Court on 1 April 2010, to be once again overturned by the Grand Chamber on appeal by the Austrian Government.

protected by Article 8’,⁴⁰⁶ the Austrian prohibitions were justified at the time. The Austrian Government had contended that IVF raised the question of ‘*unusual relationships*’ in which the ‘*social circumstances deviated from the genetic ones, namely, the division of motherhood into a genetic aspect and an aspect of “carrying the child”*’ and perhaps also a “*social aspect*”’.⁴⁰⁷

The Strasbourg Court agreed that IVF does involve ‘*sensitive moral and ethical issues against a background of fast-moving medical and scientific developments*’.⁴⁰⁸ However, since ‘*the questions raised by the case touch on areas where there is not yet clear common ground amongst the member states*’, Austria must be given a wide margin of appreciation in legislating in this area:

There is now a clear trend in the legislation of the [Member States] towards allowing gamete donation for the purpose of [IVF], which reflects an emerging European consensus. [...] That emerging consensus is not, however, based on settled and long-standing principles established in the law of the Member [S]tates but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the [s]tate.⁴⁰⁹

The Strasbourg Court reasoned that such were the unknown long-term consequences of legislation in the area of artificial reproduction; it found it ‘*understandable*’ that some Contracting States find it ‘*necessary to act with particular caution in the field of artificial procreation*’.⁴¹⁰ The Court opined that the Austrian legislation was ‘*guided by the idea that medically assisted procreation should take place similarly to natural procreation*’ and the ‘*measures are intended to prevent potential risks of eugenic selection and their abuse and to prevent the risk of exploitation of women in vulnerable situations as [egg] donors*’.⁴¹¹

Under the Austrian Artificial Procreation Act, other assisted reproduction techniques are permitted. IVF using eggs or sperm from spouses or cohabitating partners themselves (homologous methods) is permitted under the Act and so is in vivo insemination using donated sperm. The allowances ‘*show [...] the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field*’,⁴¹² adding that it found it relevant that Austrians are *also permitted* to travel abroad to receive fertility treatment unavailable in their home country. The Court underlined the importance of keeping legal and fast-moving scientific developments in the field

⁴⁰⁶ *Ibid.*, para. 52.

⁴⁰⁷ *Ibid.*, para. 67.

⁴⁰⁸ *Ibid.*, para. 76.

⁴⁰⁹ *Ibid.*, para. 96.

⁴¹⁰ *Ibid.*, para. 103.

⁴¹¹ *Ibid.*, para. 105.

⁴¹² *Ibid.*, para. 114.

of artificial procreation under review. Five of the judges dissented (Judges Tulkens, Hirvelä, Lazarova Trajkovska, and Tsotsoria) saying that in their opinion, Austrian law breached Article 8. A sixth judge, Judge de Gaetano, voted with the majority but said a ban of the kind challenged could always be justified on the ground of the '*inalienable value and intrinsic dignity of every human being*'. The Italian government was one of five interveners in the case and argued that there was no positive obligation on ECHR Contracting States to make medically assisted procreation techniques available to infertile couples. It further argued that allowing ovum donation would '*call maternal filiation into question*' and '*lead to a weakening of the entire structure of society*'. The German government presented similar arguments, saying that artificial insemination using a third-party ovum was a criminal offence in Germany. It said the ban was intended in the interest of child welfare and that splitting motherhood between a genetic and a biological mother would be '*counter to the established principle of unambiguity of motherhood which represented a fundamental and basic social consensus*'.⁴¹³ The Grand Chamber went further to declare that Article 8 also encompasses '*the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by [the right to privacy] as such a choice is an expression of private and family life*'.⁴¹⁴

(g) In relation to adoption

The Strasbourg Court has been seised to consider a number of cases concerning adoption particularly in the context of joint or second-parent adoption. It was discussed in Chapter Three that adoption has been a method applied by certain national courts (e.g. the Netherlands and Belgium) to provide intending parents (particularly the intending mother or co-parent) with legal parental status.

The topic of inter-country adoption and recognition of a foreign adoption order was considered in the case of *Wagner v. Luxembourg*.⁴¹⁵ In *Wagner*, a single woman from Luxembourg had travelled to Peru to adopt a child and had then come back to her home country to recognise the adoption as valid. Luxembourg authorities refused, since their conflict of law rules designated Luxembourg law as applicable, and this law excludes single persons from 'full' adoption (i.e. adoption that breaks ties with the family of origin). The Strasbourg Court decided in *Wagner* that this refusal to recognise the 'crystallised' relationship that the Peruvian judge had consecrated and the 'reality' of their situation was contrary to both the fundamental right to respect for private and family law and the principle of non-discrimination. At paragraphs 133 and 135 of *Wagner*, the ECtHR emphasised that conflict rules should not take precedence over the social reality and the situation of the

⁴¹³ *Ibid.*, para. 70.

⁴¹⁴ *Ibid.*, para 82.

⁴¹⁵ Application No. 76240/01.

persons concerned and that the ECHR is a living instrument to be interpreted in the light of present-day conditions. At paragraphs 155 and 156, the daily disadvantages to the child in that case of living in 'a legal vacuum' were described: these concerned disadvantages in the labour market and insecurity and inconvenience in immigration status. Finally, at paragraph 158, the Court emphasised that the child herself could not be blamed for the circumstances yet was still being penalised in her daily existence as a result of her circumstances.

The heart of *Wagner* is the concept of 'social reality': adoption has become a social reality, and therefore, Luxembourg authorities must accord it the corresponding legal status, that of a 'full' adoption. Even if in the *Wagner* case the adoption had been pronounced by a foreign Court, it could be thought that a legal status could crystallise without the intervention of the judiciary or even of any other public authority. What is characteristic of *Wagner* (and herein lies its novelty and challenge to (domestic) family law) is its immense potential for party autonomy. The fact that the 'legal status' was ever established *de facto* was due to the will of the applicant, intent on adopting. Peru was selected because of the content of its adoption law, more permissive towards single persons, and because Peruvian judges were known to generously apply it to potential foreign adopters, whatever their nationality or habitual residence. Nothing whatsoever connected the applicant with Peru (she travelled exclusively to obtain the adoption). Whenever a need for 'continuity' arises, the positive obligations imposed on Contracting States under Article 8 ECHR imply that the concerned individuals should be allowed to enjoy the situation at stake as of law.

Broadly viewed, the decision in *Wagner* calls for an actual examination of the situation in circumstances where domestic procedural rules conflict with the reality of the family situation. However, the decision cannot be so broadly read as to extend to the sweeping away of all procedural rules in favour of an approach that decides each application on a case-by-case basis. The factual situation in *Wagner* was quite particular. The jurisdictional obstacle was that Luxembourg law did not allow adoption by a single person, and in consequence, the child's adoption could never be recognised, regardless of merits.⁴¹⁶ Additionally, in *Wagner*, the practical daily disadvantages for the child concerning non-recognition were real.

The Court in *Wagner* does not address the argument presented by the Luxembourg Government, who claimed that Article 8 ECHR should not be interpreted to allow the circumvention of national law. Furthermore, she knew of the prohibition imposed by Luxembourg law against single-parent adoptions. Her conduct was purposely destined at circumventing domestic law, for her stay in Peru lasted only the necessary time to obtain the adoption from a Peruvian judge.

⁴¹⁶ The ECtHR's judgment led to a change in domestic law. See <wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2246971&SecMode=1&DocId=1969518&Usage=2>.

In *Negrepontis-Giannisis*,⁴¹⁷ the Strasbourg Court criticised the wide margin of appreciation used by Greece to refuse the recognition of a full adoption of an adult by his uncle, on the basis of the religious status of the latter. In finding a violation of Article 8 ECHR, the Court observed that the texts on which the Greek Court of Cassation, sitting as a full court, had relied on to dismiss the request were all ecclesiastical in nature and dated back to the seventh and ninth centuries. Monks had been allowed to marry in Greece, however, only since 1982, and there was no domestic legislation preventing them from carrying out adoptions. In the case under review, the adoption order had been obtained in 1984, when the applicant was already of age. It was valid for 24 years, and the adoptive father had expressed his wish to have a legitimate son who would inherit his property. In the view of the Strasbourg Court, the refusal to implement the adoption order in Greece had not met any pressing social need and had not been proportionate to the aim pursued.

The Court has also considered the eligibility aspects of adoption. While the ECHR does not include a right to adopt, in *E.B. v. France*,⁴¹⁸ the Court considered that the refusal of authorisation to adopt due to the homosexuality of the applicant constituted a difference of treatment incompatible with the provisions of Article 14 taken in conjunction with Article 8 ECHR.

In *Gas and Dubois v. France*,⁴¹⁹ the Strasbourg Court handed down its judgment on 15 March 2012, concerning a challenge to the French law restriction on second-parent adoption to married couples. The applicants were two cohabiting women who entered into a French civil partnership (a PACS). The case concerned the refusal of Ms Gas' application for a simple adoption order in respect of Ms Dubois' child who was conceived by way of ART in Belgium, born in 2000 and raised jointly by the applicants in France. As the applicants were not married, and could not marry, they had been unable to exercise parental responsibility jointly as permitted by the French Civil Code in the case of simple adoption by the spouse of the child's mother or father. In the context of simple adoption, the only exception to the transfer of parental responsibility to the adoptive parent – entailing the loss of parental responsibility on the part of the genetic parent – was in cases where the adoptive parent was the genetic parent's husband or wife (and not a civil partner in a PACS). The French Courts took the view that the consequences of the transfer of parental responsibility to Ms Gas – thereby depriving Ms Dubois of parental responsibility – would have been contrary to the child's interests.

The Court held, by six votes to one, that there was notably no evidence of a difference in treatment based on the applicants' sexual orientation, as opposite-sex couples who had also entered into a PACS were likewise prohibited from obtaining a simple adoption order.

417 *Negrepontis-Giannisis v. Greece*, Application No. 56759/08.

418 Application No. 43546/02.

419 Application No. 25951/07. See M. Wells-Greco, 'Same-Sex Second Parent Adoption – A Missed Opportunity' [2012] *International Family Law Journal*.

As such, there had been no violation of Articles 14 (prohibition of discrimination) and 8 (right to respect for private and family life) of the ECHR. According to the Court, the fact that there was a different set of adoption rules for married couples and that Ms Gas and Ms Dubois could not enter into a marriage in France did not mean that they had suffered discrimination. They were simply not equivalent to a married couple for purposes of comparison. The Court reiterated that the ECHR did not require Contracting States' Governments to grant same-sex couples access to marriage and the effects of that marital union. If a state chose to provide same-sex couples with an alternative means of recognition, it enjoyed a certain margin of appreciation regarding the exact status conferred and the consequences attached to that status. As to unmarried couples, the Court stressed that opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order. It therefore saw no evidence of a difference in treatment based on the applicants' sexual orientation. In reply to the applicants' argument that opposite-sex couples in a civil partnership could circumvent the aforementioned prohibition by marrying, the Court reiterated its findings regarding access to marriage for same-sex couples.

Where there is no possibility of second-parent adoption, this may have significant consequences for the parents and the child. The main implications include the interference with the rights and arguably the identity of the child and the second-parent in the event of separation, death of the legal parent, or other circumstances that would prohibit the parent from carrying out parental responsibilities. The Court noted that Ms Gas and Ms Dubois, who agreed to Ms Gas' fertility treatment, were actively and jointly involved in the child's upbringing, caring for and showing affection to her. The Court offered no hint that Ms Gas has failed to act as a parent in every sense of the word.

Judge Villiger disagreed strongly with the majority's approach, arguing in his dissenting opinion on the basis of the best interests of the child. Judge Villiger submitted that the respondent state had failed a substantive justification for the difference in treatment and that the non-availability of the simple adoption amounted to a violation of the applicants' rights. The primary reason for according such protection is the child's overwhelming need for stability in his or her primary caring relationships. In a decision with such an enormous potential for precedential value, Judge Villiger thought that it was disappointing that the majority decision does not address second-parent adoption hand in hand with the best interests of the child principle.

*X and Others v. Austria*⁴²⁰ concerned the complaint by two women in a committed (homosexual) relationship about the Austrian courts' refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother's legal ties with

420 Application No. 19010/07 (Judgment 19 February 2013).

the child (second-parent adoption).⁴²¹ The applicants submitted that there was no reasonable and objective justification for allowing adoption of one partner's child by the other partner if heterosexual couples were concerned, be they married or unmarried, while prohibiting the adoption of one partner's child by the other partner in the case of homosexual couples. The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the Convention on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in which one partner wished to adopt the other partner's child. It further held that there had been no violation of Article 14 taken in conjunction with Article 8 when the applicants' situation was compared with that of a married couple in which one spouse wished to adopt the other spouse's child.

The Court found in particular that the difference in treatment between the applicants and an unmarried heterosexual couple in which one partner sought to adopt the other partner's child had been based on the first and third applicants' sexual orientation. No convincing reasons had been advanced to show that such difference in treatment was necessary for the protection of the family or for the protection of the interests of the child. At the same time, the Court underlined that the Convention did not oblige Contracting States to extend the right to second-parent adoption to unmarried couples. Furthermore, the case was to be distinguished from the case *Gas and Dubois v. France* (see above), in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to any unmarried couple, be they homosexual or heterosexual.

Gas and Dubois and *X and Others v. Austria* serve as reminders that even if the scope of Article 8 of the Convention is very broad, it is still very far from comprising all family forms.

(h) Recognition of a status acquired otherwise than through a judgment

*Mary Green and Ajad Farhat v. Malta*⁴²² arose out of the Maltese authorities' refusal to recognise the validity of a marriage in Libya of a Maltese citizen, Ms Green. The problem was that Ms Green was already married in Malta to Mr X, a citizen of Malta, 'according to the rites of the Catholic Church and in conformity with Maltese law'.⁴²³ At the time, divorce was unknown in Maltese law.⁴²⁴ As a result, Ms Green had gone to Libya, converted to

421 See M. Wells-Greco, 'Second-Parent Adoption in a Same-Sex Relationship: Gentle Strides in the Recognition of Family Forms and Human Relations' [2013] International Family Law Journal.

422 Application No. 38797/07 (Admissibility decision 6 June 2007).

423 *Ibid.*, para. 1 (background).

424 Following a referendum in Malta on 28 May 2011, the law on divorce came into force on 1 October 2011 and is now regulated by the Maltese Civil Code (Article 66A of the Civil Code; available at: <www.justice-services.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580>).

Islam by means of a declaration – which had the added benefit of automatically dissolving her marriage to a Christian, according to the precepts of Islam and in conformity with Libyan law – and had married Mr Farhat. The spouses then established their matrimonial domicile in Libya. The fact remains that when, after some 20 years of residence in Libya, Ms Green and her new husband applied to have their marriage registered in Malta, the Director of the Public Registry refused to do so. The Director claimed that Ms Green had not proven that her first marriage had been dissolved and that her second marriage had not been polygamous, and therefore, the marriage was contrary to Maltese public policy. The Maltese courts upheld this determination.

The applicants complained to the Strasbourg Court based on their right to family life. The Court, assuming that there has been an interference with the applicants' private and family life, first noted, generally, that such interference will be in breach of Article 8 ECHR unless it can be justified under Article 8(2) as being:

In accordance with the law, as pursuing one or more of the legitimate aims listed therein, and as being necessary in a democratic society in order to achieve the aim or aims concerned [...] A fair balance has to be struck between the competing interests of the individual and of the community as a whole, and the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.⁴²⁵

Addressing, then, the requirements of Maltese law, it went on to find:

That those requirements fall within the sphere of the respondent State's public policy, and it cannot be said that the national authorities exceeded their margin of appreciation either in imposing the requirements or in applying them in the applicants' case. In view of the interests of the community in ensuring monogamous marriages, and those of the third party directly involved, namely the first applicant's first husband, the Court cannot find that, in the circumstances of the case the domestic courts failed to strike a fair balance between the conflicting interests. Thus, the situation complained of can be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights of others.⁴²⁶

Kinsch writes that the *Green* decision is in line with the ECtHR's holding in *Wagner v. Luxembourg*. The application of the PIL rules of the state of non-recognition of a status

⁴²⁵ Note 422, at 'Court's Assessment'.

⁴²⁶ *Ibid.*

acquired abroad must, to the extent that it interferes with the parties' legitimate expectations as to the stability of their family relationship, be justified in accordance with the principle of proportionality.⁴²⁷ On that reading, *Green* extends that application of Article 8 from a status acquired through a foreign judgment (in *Wagner*, a Peruvian adoption judgment) to a status acquired extrajudicially.

(i) In relation to surrogacy

The Strasbourg Court has considered five surrogacy-related cases: *Lavissee v. France*,⁴²⁸ *Mennesson v. France*,⁴²⁹ *Labassee v. France*,⁴³⁰ *D and Others v. Belgium*,⁴³¹ and *Paradiso and Campanelli v. Italy*.⁴³² These decisions are considered below.

Refusal to register a surrogacy association

Lavissee concerned the French refusal in the late 1980s to register a French association called 'les Cicognes', which has the defence of the moral and material interests of surrogate mothers and promotion and moral endorsement of surrogate motherhood as a goal. The (then) European Commission held that this refusal to register did not violate Article 11 or Article 14 ECHR. The interference of the right to freedom of assembly and association was considered to be necessary in a democratic society for the prevention of crime, i.e. the incitement to abandon a child.

Recognition of a family relationship

Mennesson and *Labassee* concerned France's refusal to grant legal recognition to parent-child relationships legally established in the USA between surrogate-born children and French resident national intending parents. In both cases, the Court held, unanimously, that there had been no violation of Article 8 ECHR concerning the applicants' right (the applicants being the intending parents and the surrogate-born children) to respect for their family life but a violation of Article 8 concerning the children's right to respect for their private life.⁴³³

Relying on Article 8, the applicants complained that, to the detriment of the children's best interests, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad. The applicants in the *Mennesson* case further

427 P. Kinsch, 'Private International Law Topics before the European Court of Human Rights Selected Judgments and Decisions (2010-2011)' [2011] Yearbook of Private International Law 13.

428 Application No. 14223/88.

429 Application No. 65192/11. Discussed in Chapter Three in relation to France.

430 Application No. 65941/11. Discussed in Chapter Three in relation to France.

431 Application No. 29176/13. Judgment handed down on 11 September 2014.

432 Application No. 25358/12. Chamber judgment handed down on 27 January 2015.

433 See M. Catto, 'La gestation pour autrui: d'un problème d'ordre public au conflit d'intérêts ?' [2013] 3 Revue des droits de l'homme.

alleged, in particular, a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8, arguing that their inability to obtain recognition placed the children in a discriminatory legal situation compared with other children when it came to exercising their right to respect for their family life.

In *Mennesson*, the Court found that Article 8 was applicable in both its family life aspect and its private life aspect. First, there was no doubt that Mr and Mrs Mennesson had cared for the twins as parents since birth and that the family had lived together in a way that was indistinguishable from family life. To be able to speak of family life within the meaning of Article 8 (as discussed above), the persons concerned must generally have had a genuine relationship, which may be evidenced by factual circumstances, such as their cohabitation, the personal contacts which they maintain with each other and other familial facts; the mere fact of a genetic link is not of itself sufficient to support the conclusion that family life exists. Indeed, on the reported facts of the case, there was no reason to doubt that a unit of the most profound emotional, personal, social, and cultural significance had been created between the child and her intending parents, and, based on the Strasbourg Court's broad assessment of what constitutes family life, the intending parents have acted as the children's parents in every respect since 2001; the intending father is genetically related to the children; and the children have been living in France with the intending parents for over 11 years.

The Strasbourg Court noted that the interference with the applicants' right to respect for their private and family life resulting from the French authorities' refusal to recognise the legal parent-child relationship had been 'in accordance with the law' within the meaning of Article 8. Therefore, the Court had to examine if France had complied with its negative obligations under Article 8.⁴³⁴ According to the principles set out by the Court in its case law (discussed above), where the existence of a family tie with a child has been established, the Contracting State must act in a manner calculated to enable that tie to be developed and establish legal safeguards that render possible the child's integration in his family.⁴³⁵ The positive obligations that Article 8 lays on the Contracting States in this matter must also be interpreted in the light of the CRC.⁴³⁶ The Court accepted that the interference in question had pursued two of the legitimate aims listed in Article 8, namely, the protection of health and the protection of the rights and freedoms of others. Protecting women from exploitation or the commodification of reproduction can be considered as legitimate aims a state can invoke in order to justify this interference with Article 8.⁴³⁷ It observed that the refusal of the French authorities to recognise the legal relationship between children born as a result of surrogacy abroad and the couples who had the treatment stemmed from a wish to discourage French nationals from having recourse outside

⁴³⁴ *Mennesson*, paras. 48-49, *Labassee*, para. 49.

⁴³⁵ See *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, at 32.

⁴³⁶ See *Maire v. Portugal*, Application No. 48206/99, ECHR 2003 VII, at 72.

⁴³⁷ *Mennesson*, para. 62, *Labassee*, para. 54.

of France to a reproductive technique that was prohibited in that country with the aim, as the French authorities saw it, of protecting the children and the surrogate. Moreover, even if these arguments remain contentious (and it is conceded that they do), the margin of appreciation accorded to Contracting States when implementing their human rights obligations is such that they could still rely on these arguments to justify the prohibition of commercial surrogacy.

The Court went on to examine whether the interference had been 'necessary in a democratic society'. It stressed that a wide margin of appreciation had to be left to Contracting States in making decisions relating to surrogacy, in view of the difficult ethical issues involved and the lack of consensus on these matters in Europe. Yet the features and context of the complaint and the absence of a consensus among the Contracting States are all relevant in determining the margin of appreciation. For the Court, that margin of appreciation was narrow when it came to parentage, which involved a key aspect of individuals' identity.⁴³⁸

For reasons that are not particularly clear, the Court held that it was necessary to distinguish between the purported right of family life of the intending parents on the one hand and the purported right to private life for the surrogate-born children (as applicants) on the other. With regard to each of the four applicants' right to family life, the Court observed that it was inevitably affected by the lack of recognition under French law of the parent-child relationship between Mr and Mrs Mennesson and the twins. However, it noted that the applicants had not claimed that the obstacles they faced had been insurmountable nor had they demonstrated that they had been prevented from the enjoyment in France of their right to respect for their family life. It noted that the four of them had been able to settle in France shortly after the birth of the children; that they lived there together in circumstances which, by and large, were comparable to those of other families; and that there was nothing to suggest that they were at risk of being separated by the authorities because of their situation under French law. Furthermore, the French courts had examined their specific situation before concluding that the practical difficulties faced by the applicants did not exceed the limits imposed by respect for family life. Consequently, a fair balance had been struck between the adult applicants' interests and those of the state, in so far as their right to respect for their family life was concerned.⁴³⁹ However, when extending the same analysis to the rights of the children, the Strasbourg Court found that their Article 8 ECHR right to private life had been violated because of, among others, the repercussions of the situation on the definition of the children's own identity. The Court noted that the children were in a state of legal uncertainty: the French authorities, although

⁴³⁸ See *Mennesson*, paras. 40 to 42 and 78.

⁴³⁹ See *Mennesson*, paras. 88, 90 and 91.

aware that the twins had been identified in the USA as the children of Mr and Mrs Mennesson, had nevertheless denied them that status under French law.

The Court also noted that – according to French succession laws – the children would only be able to inherit from the intending parents as legatees, which meant that they would be put in a less favourable situation. The Court considered that the contradiction undermined the children’s identity within French society. Moreover, although their genetic father was French, the children faced worrying uncertainty as to the possibility of obtaining French nationality, a situation that was liable to have negative repercussions on the definition of their own identity. The Court regarded this as depriving them of a further component of their identity in relation to their parentage. The children’s right to respect for their private life had to be understood such that everyone should be able to establish the essence of his or her identity, including his or her parentage: ‘*private life requires that everyone can establish details of his human identity*’.⁴⁴⁰ There was therefore a serious issue as to the compatibility of the situation with the children’s best interests.

In the Strasbourg Court’s view, this analysis took on a special dimension when, as in the present cases, one of the parents was also the child’s genetic father. For the Court, genetic heritage forms part of an individual’s identity, and it cannot be considered to be in the best interests of these particular children to prevent the genetic relationship from being established for the purposes of French law. The inability of the intending fathers to establish paternity (e.g. acknowledging the children, by adoption or by applications of the rules of apparent status) is held to be a breach of surrogate-born children’s right to identity.⁴⁴¹ Given the importance of genetic parentage as a component of each individual’s identity, it could not be said to be in the best interests of the child to deprive him or her of a legal tie of this nature when the genetic reality of that tie was established and the child and the parent concerned sought its full recognition. Not only had the tie between the twins and their genetic father not been acknowledged when the request was made for the birth certificates to be entered in the register; in addition, the recognition of that tie by means of a declaration of paternity or adoption, or on the basis of *de facto* enjoyment of status, would fall foul of the prohibition established by the case law of the Court of Cassation in that regard. In thus preventing the recognition and establishment of the children’s legal relationship with their genetic father, the French State had overstepped the permissible margin of appreciation. The Court held that the children’s right to respect for their private life had been infringed, in breach of Article 8.

In view of its finding of a violation of Article 8 concerning the applicant children, the Court did not consider it necessary to examine the applicants’ complaint under Article

⁴⁴⁰ See *Mennesson*, paras. 46 and 99. In so doing, the Court extends Article 8 ECHR by developing the idea of a right to identity present in both the *Jaggi v. Switzerland* (13 July 2006, Application No. 58757/00) and *Mikulic v. Croatia*, (7 February 2002, Application No. 53176/99) judgments.

⁴⁴¹ See *Mennesson*, paras. 100 and 101.

14. The Court held that France was to pay EUR 5,000 to each of the children in respect of non-pecuniary damage and EUR 15,000 to the applicants in respect of costs and expenses.

In *Labassee v. France*, the Court adopted the same approach as in the *Mennesson* case finding that there had been no violation of Article 8 concerning the applicant parents' right to respect for their family life but a violation of Article 8 concerning the right of Juliette Labassee to respect for her private life. The Court held that France was to pay EUR 5,000 to the latter in respect of non-pecuniary damage and EUR 4,000 to the applicants in respect of costs and expenses.

Against the backdrop of the review of the Article 8 case law presented above, the reasoning of the Strasbourg Court in these decisions raises a number of points.

The readiness of the Court in *Mennesson* and *Labassee* to confirm that, in accordance with its case law, the relationship between the applicants amounted to family life within the meaning of Article 8 is noteworthy.⁴⁴² The French Government had not disputed that applicability. This is illustrative of the Court's recognition of *de facto* (and very real) family ties in its case law. In particular, it implicitly recognises that a range of relationships may be important to a child's development and not necessarily only the relationship with his or her genetic parents. Also, given that the Convention is a living instrument to be interpreted in present-day conditions, the Contracting State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil status, and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life. There are, however, undercurrents in the Court's reasoning that also feeds into the traditional narrative, which insists on the primacy of genetic ties regarding identity and legal filiation, namely, the legal recognition of the genetic father-child relationship.⁴⁴³

With regard to the right to respect for family life, the Court took into account the admission of the applicants that the obstacles, caused by the non-recognition of the parent-child relationship, were not insurmountable. Echoing in many ways its judgments in *Johnston*, *Chavdarov*, and *X, Y, and Z*, for the Court, the applicants failed to demonstrate that they had been prevented from the enjoyment in France of their right to respect for family life. Therefore, also considering the margin of appreciation, the decision of the *Court de Cassation* struck a fair balance between the interests of the applicants and those of the French state.⁴⁴⁴

With regard to the right to respect for the private life of the children, the Court found a breach of Article 8. These children were confronted with legal uncertainty because of

⁴⁴² *Mennesson*, para. 46 and *Labassee*, para. 37.

⁴⁴³ The Court defined the interests of the child in relation to the children's biological ties with their genetic father (para. 100; para. 79). It stressed that the latter are crucial for children's identity.

⁴⁴⁴ *Mennesson*, paras. 92-94, *Labassee* paras. 71-73.

the non-recognition in the French legal order of the *de facto* bond of affiliation between them and the intending parents. The concept of identity includes the legal recognition of relationships between children and parents. In conclusion, the Court posed that the deprivation of a legal recognition of the genetic reality, being that the intending father was their genetic father, was against the best interests of these children.⁴⁴⁵ Considering the consequences for the identity of the children and their right to respect for private life, France exceeded the wide margin of appreciation left to Contracting States in the sphere of decisions relating to surrogacy.⁴⁴⁶

The Court appears to posit the family's individual members as being in confrontation. It is, therefore, difficult to follow the reasoning of the Court when it comes to assess the Article 8 violation *vis-à-vis* the intending parents (in their capacity as applicants). While the Strasbourg Court acknowledges the existence of family life between the four applicants and the importance of having the possibility of obtaining legal recognition thereof with respect to the children, the Court fails to see the applicants as one family unit, each benefiting family life as a whole. This approach is questionable. What evidence should the applicants have adduced to show that they had been prevented from the enjoyment in France of their right to respect for their family life? The joining of these children to these families crystallises these family units and has repercussions on the place of the child in his or her family as well as in his or her wider community. This is the case regardless of the way in which the child was conceived or what is his or her genetic or biological lineage.

Perhaps the Court's cautious manoeuvring relates to the position of the status of the intending mother. The certainty with which European legislatures (except Greece, Russia, and Ukraine) have expressed their opposition to legal maternity via surrogacy and the commitment with which they have embraced the *mater semper certa est* principle is so nearly universal that the margin of appreciation according to Contracting States is likely to be substantial. Yet it is questionable why the Court does not consider the cases from the perspective of the State's positive obligation to acknowledge family relations and act in a way to preserve them (following the line of reasoning in *Wagner*)? The Court seems to repeat the reasoning behind *X, Y, and Z v. the United Kingdom* (discussed above), namely, that there is family life but no positive obligation to protect it as a whole. As discussed below, the question presents itself even more pressingly in *Paradiso and Campanelli v. Italy*, given the absence of a genetic link with the intending parents, with the child being placed in a state institution.

Leaving aside a possible conflict of interests between the family members, it is disappointing that the Strasbourg Court did not take the opportunity in *Mennesson* and *Labassee* to remind France (and others) that efforts should be made to ascertain the children's

⁴⁴⁵ *Mennesson*, para. 99, *Labassee* para. 78.

⁴⁴⁶ *Mennesson*, para. 100, *Labassee* para. 79.

position and views to enable the Court to assess the child's best interests. This is particularly relevant given these children's ages. In a decision that has such an enormous potential for 'precedential' value, it is disappointing that the majority decision does not address the status of these children hand in hand with the best interests of the child principle and the child's right to be heard.⁴⁴⁷

For the Court, to deny *any* legal protection of a child's relationship with his or her genetic parents, as a matter of law, is inconsistent with a child's right to private life (meaning identity) and, it would seem, international public policy.⁴⁴⁸ As considered above, the Court does not say that France must necessarily legislate to provide for rules of filiation in the context of surrogacy or to legislate in favour of surrogacy;⁴⁴⁹ it is for France to determine what legal recognition is to be provided and how to remedy the Article 8 violations and implement each judgment. Indeed, France may have the means within its domestic law to remedy the lack of legal protection. It could apply its rules on apparent status to provide the intending parents (more specifically the intending (genetic) father) with a means of acquiring the status of parenthood, which would recognise the paternity of the genetic father while arranging for a sharing of parental authority with his wife or partner. As discussed in Chapter Three, if a child has a certain apparent status, it means that from apparent facts, it appears that a certain man or woman is the (legal) father or mother of the child. France could also decide to legislate to provide specific rules on parenthood and to extend its domestic (PIL) rules to cater for surrogacy arrangements. Perhaps a proportionate interim solution could be found by enabling intending parents to apply, at the very least, for guardianship-type orders.

⁴⁴⁷ Note that France has ratified the European Convention on the Exercise of Children's Rights ('ECECR'). The ECECR stresses in the preamble the aim of promoting the rights and 'best interests' of children. To that end, it states that children should have the opportunity to exercise their rights, particularly in family proceedings affecting them; they should be provided with relevant information (defined as information appropriate to the child's age and understanding, given to enable the child to exercise his or her rights fully, unless contrary to the welfare of the child), and their views should be given 'due weight'; and, 'where necessary', States as well as parents should engage in the protection and promotion of those rights and best interests (preamble). The ECECR procedural rights include the child's right to be informed and to express his or her views in proceedings; the right to apply for the appointment of a special representative; and 'other possible procedural rights', e.g. the right to apply to be assisted by an appropriate person of their choice to help them express their views, the right to appoint their own representative, and the right to exercise some or all of the rights of parties to the proceedings (Articles 3-5).

⁴⁴⁸ For the Austrian Constitutional Court, it would also be contrary to the principle of the best interest of the child (*see* in Chapter Three at 3.5).

⁴⁴⁹ The Court notes the diversity of legislature in Europe and finds 'that resorting to surrogacy raises delicate ethical questions' (65192/11 at para. 79). According to the Court, the States have 'an ample margin of appreciation, concerning not only the decision on whether or not to authorise this method of procreation but also on whether or not to recognise the line of kinship between children who are legally conceived by surrogacy and the intended parents'. (65192/11 at para. 79).

Delay in authorising the arrival of a surrogate-born child to the home state of the intending parents

In its decision in the case of *D and Others v. Belgium*, the Strasbourg Court decided, unanimously, to strike the application out of its list in so far as it concerned the Belgian authorities' refusal to issue a travel document for the surrogate-born child and to declare inadmissible the remainder of the application. The case concerned the Belgian authorities' initial refusal to authorise the arrival on its national territory of a child who had been born in Ukraine from a surrogacy arrangement, as resorted to by the applicants, two Belgian nationals.⁴⁵⁰ This refusal, maintained until the applicants had submitted sufficient evidence to permit confirmation of a family relationship with the child, resulted in the child effectively being separated from the applicants and amounted to interference in their right to respect for their family life. The Court noted that this interference had been provided for by law and pursued several legitimate aims, namely, the prevention of crime, especially trafficking in human beings, and the protection of the rights of others – those of the surrogate mother and of the child.⁴⁵¹ Belgium had acted within its margin of appreciation to decide on such matters.

The Court also considered that there was no reason to conclude that the child had been subjected to treatment contrary to Article 3 ECHR (prohibition of inhuman or degrading treatment) during the period of his separation from the applicants. In view of developments in the case since the application was lodged, namely, the granting of a *laissez-passer* for the child and his arrival in Belgium, where he has since lived with the applicants, the Court considered this part of the dispute to be resolved and struck out of its list the complaint concerning the Belgian authorities' refusal to issue travel documents for the child.

Separation of a surrogate-born child from the intending parents

The case of *Paradiso and Campanelli* concerned placement in social service care of a nine-month-old child who had been born in Russia following a gestational surrogacy agreement entered into by an Italian national resident couple; it subsequently transpired that they had no genetic relationship with the child.⁴⁵² The reported facts of the case are as follows. A married Italian couple tried to become parents but could not succeed because of the infertility of the woman. In 2006, the couple was declared ineligible for adoption of young children. They travelled to the Russian Federation to have access to IVF using the second applicant's sperm and the ova of an unknown donor woman, implanting the embryo in the surrogate mother's womb (unlawful in Italy but possible in the Russian Federation, due to lack of specific legislation there⁴⁵³). They concluded a surrogacy agreement with

450 Paras. 4 to 18.

451 Paras. 52 and 53.

452 Application No. 25358/12.

453 Para. 43.

the private company referred to as 'Rosjurisconsulting'. In February 2011, a child was born, who was handed by the surrogate mother to the applicants in exchange of EUR 50,000, the applicants being recognised as parents, according to Russian Federation law. When the applicants returned with the child to Italy, they tried unsuccessfully to register the birth. Their demand of the transcription of the birth certificate of the child was rejected, as the birth certificate contained false information about the parents of the child – the DNA test proving that the applicant was not the genetic father of the child. After it was revealed that neither parent was genetically related to the child, in October 2011, the Campobasso Court ordered that the child be removed from the applicants and placed under guardianship. The child was placed in a children's home, and later foster care, with no contact with the applicants. In April 2013, the refusal to register the Russian birth certificate was confirmed on the ground that its registration would be contrary to public policy. The child received a new birth certificate indicating that he had been born to unknown parents. The prosecutor at the Campobasso Court opened proceedings to place the child for adoption, since, for the purposes of Italian law, he had been abandoned.⁴⁵⁴

The Strasbourg Court dismissed at the outset the complaint submitted in the child's name, finding that the applicants did not have standing to act on the child's behalf, given that the child had been out of their care for over two years and was in the process of being adopted by a different family under a different identity.⁴⁵⁵ The complaint of alleged violation of Article 8 in that it was impossible to have the child's birth certificate registered in Italy was also dismissed, for failure to exhaust domestic remedies.⁴⁵⁶ Had that claim been declared admissible, the decision of *Wagner v. Luxembourg*,⁴⁵⁷ which concerned civil proceedings to have an adoption judgment, delivered in Peru, declared enforceable in Luxembourg, may have provided helpful guidance to the Court.

With regard to the complaint concerning the child's removal and placement under guardianship, the Court, noting the existence of *de facto* family life between the couple and the child, held that Article 8 was applicable in this case and declared this complaint admissible.⁴⁵⁸ The Strasbourg Court found in particular that the public policy considerations underlying the Italian authorities' decisions – finding that the applicants had attempted to circumvent the prohibition in Italy on using surrogacy arrangements and the rules governing international adoption – could not take precedence over the best interests of the child, in spite of the absence of any genetic relationship and the short period during

454 Paras. 5 to 35.

455 Paras. 48 to 50.

456 Para. 4.

457 Application No. 76240/01, 28 June 2007. See the discussion at 4.11.3(g) above and P. Kinsch, 'Private International Law Topics before the European Court of Human Rights Selected Judgments and Decisions' [2011] Yearbook of Private International Law.

458 Para. 67.

which the applicants had cared for him.⁴⁵⁹ The Court considered that, in the present case, the conditions justifying a removal had not been met: the Italian authorities had not given sufficient weight to the best interests of the child when balancing them against public policy considerations. The authorities had decided to remove the child and to place him under guardianship on the ground that he had no genetic relationship with the applicants and that the applicants had been in an unlawful situation (by entering into a ‘contract’ with a Russian agency in order to become parents and subsequently bringing to Italy a child whom they presented as their child, they had circumvented the prohibition in Italy on using surrogacy arrangements and the rules on international adoption). In particular, the authorities had not recognised the *de facto* relationship between the applicants and the child and had imposed an extreme measure, reserved for cases where children were in danger.

The Court held that the removal of the child by the Italian authorities constituted an interference with their family life in breach of Article 8 because the authorities had not properly considered the balance between Italy’s public policy considerations, on the one hand, and the best interests of the child, on the other.⁴⁶⁰ However, the Court also noted that its decision should not be read to require return of the child to the applicants, as the child has no doubt developed a bond with the family with whom he has been living since April 2013.⁴⁶¹ It is questionable whether the Italian Government had advanced sufficient reasons relevant to the welfare of this particular child to justify this. While this conclusion may seem appropriate given the Court’s role and the specific circumstances set out in the judgment, the decision would appear to be a pyrrhic victory for the applicants.⁴⁶²

The decision in *Paradiso* is significant for a number of reasons. In the cases of *Mennesson* and *Labassee*, the intending father (an applicant before the Strasbourg Court) was the child’s genetic father: it was his gametes which were used in the IVF procedure carried out abroad. In *Paradiso*, unknown gametes were used, erroneously according to the applicants, who claimed that the applicant intending father was unable to explain why his seminal fluid was not used by the Russian clinic as planned. As discussed above, the existence of this genetic relationship in the French cases is decisive in the Court’s finding of a violation.

459 Paras. 73 and 75.

460 Para. 86 and 87. Note that the Court held that Italy was to pay the applicants EUR 20,000 in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses. As an observation, this appears to be a significant award for just satisfaction (Article 41 ECHR) in comparison with its awards in *Mennesson* and *Labassee*.

461 Para. 88.

462 See also, in the context of adoption, the Court’s decision in *Keegan v. Ireland* 18 EHRR 342 1994: Irish law at that time permitted the secret placement of the child for adoption without the applicant’s (the genetic father’s) knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order. This amounted to an interference with the applicant’s right to respect for family life. By the time these proceedings had terminated, the scales concerning the child’s welfare had tilted inevitably in favour of the prospective adopters.

Nevertheless and in continuation of the Article 8 reasoning in *Mennesson*, it should be noted that the Court in *Paradiso* found that family life exists in a surrogacy arrangement even in the absence of a genetic relationship. As observed below, this may prove to be a watershed ruling for those intending parents without a genetic relationship with the surrogate-born child, who now falls within the scope of protection afforded by Article 8 ECHR.

With respect to this child's identity, the Court notes that the child received a 'new' identity only in April 2013, which means he was 'non-existent' for more than two years. The Court stresses that no child should be disadvantaged because he was born to a surrogate mother, whether in terms of nationality or identity, which are of paramount importance (the Court cites Article 7 CRC).⁴⁶³

The joint partially dissenting opinion of Judges Raimondi and Spano must be noted. The dissenting judges thought that a fair balance had been struck between competing public and private interests in this case, and there was no reason to question the assessment of the Italian courts. In their opinion, where national courts are faced with difficult questions of balancing interests, the Court should restrain itself only to confirming that the assessment of the national judges was not arbitrary.⁴⁶⁴

4.11.4 *Specific lessons from the European Court of Human Rights*

The Strasbourg Court's consideration of the cases of *Paradiso*, *Labassee*, and *Mennesson* attests to the topicality of surrogacy and the complexity of the legal (and ethical) issues involved in regulating it.

The French Government in *Mennesson* and *Labassee* argued that there was no consensus among the Contracting States on the topic of surrogacy and that consequently the respondent State had a wide margin of appreciation to regulate this issue. The Court observed that there is no consensus across Europe with respect to the legality of surrogacy arrangements or, more particularly, no consensus as to the recognition to be given between the intending parents and the surrogate-born children lawfully established abroad. The Court also considered the number of states have expressly prohibited surrogacy and noted that 14 of the 35 Contracting States (in addition to France) have such a prohibition of which 10 have legislative provisions which seem to suggest that surrogacy is prohibited but the legality of such an arrangement is uncertain. In contrast, the Court noted that surrogacy arrangements are tolerated in 4 Contracting States. In 13 of the 35 Contracting States considered by the Court, it appears possible to obtain legal recognition of parentage established abroad. However, the issue before the Court was not the general question of access to surrogacy *per se* – for which the Court holds that the Contracting States benefit

⁴⁶³ Para. 85.

⁴⁶⁴ Joint partially dissenting opinion of Judges Raimondi and Spano, paras. 13 to 15.

from a wide margin of appreciation – but the non-recognition of a parent-child relationship established between these specific applicants. On the one hand, France had a wide margin of appreciation because in the sphere of decisions relating to surrogacy, there is no European consensus and because of the difficult ethical issues involved. On the other, the margin was narrow because it concerned (genetic) parentage, a key aspect of the existence or identity of an individual.⁴⁶⁵

None of these judgments rule on the question of prohibiting or authorising surrogacy arrangements. The Court stresses in *Paradiso* that Article 8 ECHR neither guarantees a right to found a family in all circumstances nor a right of adoption.⁴⁶⁶ However, the decision to separate a surrogate-born child from his or her intending parents and any consideration of whether a foreign court decision (or foreign civil status document) is contrary to public policy must take into account the human rights guaranteed by the ECHR and CRC. In terms of the rights of the child, the Court, among other things, relied in these decisions on the child's right to parental care, identity, and upbringing. The child's right in that context would be violated if a legal status already established abroad were to be abolished. According to these decisions, the legal relationship between a child and his or her parents forms part of the child's identity which would otherwise be undermined.

For the Court in *Mennesson* and *Labassee* to refer to the genetic reality of the intending fathers, the approach mirrors the Court's developing approach to recognise paternal genetic relations once family and social ties are established. On one reading of these judgments, it could be concluded that only the legal recognition of the relationship between the genetic (intending) father with social ties and the child is sufficient to meet the requirements of Article 8 ECHR. That position arguably privileges male genetic parenthood of intending parents (and potentially sperm donors) and excludes female genetic parents whether they are intending parents (potentially egg donors). On another, more expansive reading, a child's right to an identity read together with his or her best interests considered in the long term, leads to the conclusion that Article 8 requires the establishment of legal parenthood in favour of both intending parents *provided* that one of the intending parents has a genetic relationship with the child.⁴⁶⁷ It would be incongruous to read the judgments as suggesting that the rights of children to establish details of their identity and their right to establish and preserve their private and family life as understood in the context of their best interest's leads to the conclusion that there should be asymmetry in the parental statuses between an intending mother (or second parent) and an intending father. While a reading of *Paradiso* supports that conclusion, the Court in *Mennesson* and *Labassee* did not find

⁴⁶⁵ *Mennesson*, paras. 77-80, *Labassee*, paras. 56-59.

⁴⁶⁶ With respect to a 'purported' right to adopt: *E.B. v. France*, Application No. 43546/02, para. 41, 22 January 2008.

⁴⁶⁷ The absence of any genetic and social relationship would undermine the framework for inter-country adoption.

that Article 8 requires the respondent State to facilitate that family life by enabling the second intending parent to be vested with parental status or responsibility over that child. The significant impact this would have on the child's family life was not addressed. It is regrettable that the Court did not take this opportunity to consider this aspect.

The judgments must be 'read down' in such a way as to ensure that the essence of the protected right to family and private life is not impaired on the basis that the family units that are created are, in most cases, likely to be indistinguishable from other close family relationships. To treat the second intending parent differently with regard to the acquisition of parental status requires an objective and reasonable justification for the difference in treatment. This is on the basis that the child's sense of personal identity and security within his or her family would be affected by the fact that the persons who actually assume the role of parent are not legally recognised as such. That a similar status could not have been acquired under national law is not, in itself, enough. Yet there are important public policy factors to be considered. With respect to surrogacy and modern reproductive techniques, the protection of health or morals, the prevention of crime, or the protection of rights and freedoms of others (in particular the child) might be legitimate objectives for states to restrict an Article 8 ECHR. Those restrictions must, however, be provided for by law and be necessary in a democratic society, i.e. proportional to the objective aimed at and acceptable in an open, free, tolerant, and pluralistic society. The Strasbourg Court in *Mennesson* considered the legitimate aims submitted by the French Government and held that the Court was not convinced that the aims to defend *ordre public* and breach of criminal law were proportionate in the circumstances. Instead, the aims of protecting health (presumably the health of the surrogate and the child) and protecting the rights and freedoms of others (presumably, again, of the dignity of the surrogate and the child and the informed consent of the surrogate to the arrangements) were considered to be legitimate aims pursuant to Article 8. The lawfulness of the arrangements in the state in which these children were born (e.g. in California) is also relevant and distinguishable from illegal domestic surrogacy. In *D and Others v. Belgium*, the Court points out that the respondent State had a margin of appreciation to decide on such matters such as the issuance of a travel document in these circumstances and that any interference in family life had to be provided for by law and pursue legitimate aims, namely, the prevention of crime, especially trafficking in human beings, and the protection of the rights of the surrogate and the child.

In the context of parentage and same-sex couples, it should be noted that the preservation of the 'traditional' family has not been held to be a factor of sufficient weight. It will be recalled that the Court in *Schalk and Kopf v. Austria* found that there is no 'evidence to show that a family with two parents of the same sex could in no circumstances adequately

provide for a child's needs'.⁴⁶⁸ It has long been established in case law that now all Contracting States must have particularly serious reasons for a differential treatment based on sexual orientation.⁴⁶⁹ Where one of the intending parents is genetically related to the child, it is difficult to moot serious and legitimate reasons why a homosexual intending parent should be treated differently than a heterosexual intending parent. This is particularly so if the Contracting State in question permits adoption and/or fostering irrespective of the sexual orientation of the prospective adopters or foster parents.

It must be remembered that the lack of a legal relationship between the child and the intending mother or the second intending parent creates the same disadvantages and uncertainties regarding inheritance rights, child custody, and other day-to-day parental duties as the historical position of the unmarried father considered above, which, to paraphrase the Strasbourg Court, is likely, in many cases, to '*fly in the face of both established fact and the wishes of those concerned without actually benefiting anyone*'.⁴⁷⁰

The decisions of the Strasbourg Court are undoubtedly landmarks for the protection of the rights of surrogate-born children and as such will have significant impact on the future development of European family law. The judgments suggest that any blanket ban on the recognition or non-establishment of parenthood in favour of both intending parents may not satisfy the standard of proportionality as developed and applied by the Strasbourg Court. Although the judgments are not necessarily predictive of the approach to be adopted in each of the 47 courts of the Contracting States, the decisions in *Mennesson* and *Labassee* do, nevertheless, suggest that the approaches adopted in Austria (discussed in Chapter Three) and Germany⁴⁷¹ provide for interesting comparative examples of how proportionality and the application of the public policy assessment might apply in the context of surrogacy.⁴⁷²

It is predicted that a proportionality review of national surrogacy laws (or policy) will lead to a softening of restrictive responses to the recognition of a parental status established

468 19 February 2013, Application No. 19010/07, para. 142. See also the *obiter dictum* in *Vallianatos and others v. Greece*: when a European state legislates on family issues, it 'in its choice of means [...], must necessarily take into account developments in society and changes in the perception of social and civil status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life' (7 November 2013, Application Nos. 29381/09 and 32684/09, para. 84).

469 See, generally, L. Hodson, 'The Rights of Children Raised In Lesbian, Gay, Bisexual or Transgender Families: A European Perspective' [2009] ILGA Europe.

470 *Kroon v. the Netherlands* (1995) 19 EHRR 263, para. 40.

471 See, *infra*, Supreme Court of Germany decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13).

472 Three similar cases against France are currently pending before the Court: *Laborie v. France* (Application No. 44024/13): impossibility for a French couple to obtain recognition in France of the parent-child relationship between them and children born in Ukraine through a surrogate pregnancy. *Foulon v. France* (Application No. 9063/14) and *Bouvet v. France* (Application No. 10410/14): impossibility for a French national to obtain recognition in France of the parent-child relationship between him and a child born in India through a surrogate pregnancy.

abroad. In matters relating to the family rights of children, the ECtHR has articulated the following key principles:

- i. *'The community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront'*.⁴⁷³ This means looking at the child's legal situation *'seen as a whole'*.⁴⁷⁴
- ii. *'Respect for family life implies [...] the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family'*.⁴⁷⁵ The Court has a tendency towards adopting an increasingly broad and pragmatic view of which relationships may constitute family life. The Court has held that *'the institution of the family is not fixed, be it historically, sociologically or even legally'*.⁴⁷⁶
- iii. Although in the subsidiary system established by the ECHR Contracting States enjoy a variable margin of appreciation on the means to reach their objectives, that margin, however, is at variance with the seriousness of the situation and the interests at stake: it seems that the margin of appreciation is restricted when the issues are the right of access or other legal safeguards needed for children to preserve the right to private and family life. In matters concerning the status of children and matters concerning a child's identity,⁴⁷⁷ the role that genetic relationships play in the task of identity formation and their significance in forming one's self-knowledge and identity render anonymous surrogacy and gamete donation inherently problematic.
- iv. In determining whether an interference with family life is justified, the ECtHR *'attaches special weight to the overriding interests of the child'*⁴⁷⁸ and the circumstances as a whole. In order to assess the proportionality of an interference with a right, it is appropriate to examine its impact on that right, as well as the grounds and consequences for the

473 *X, Y, and Z v. UK*, *infra*, para. 47.

474 *Johnston v. Ireland*, *infra*, para. 75.

475 *Marckx v. Belgium*, *infra*, para. 31.

476 *Mazurek v. France*, *infra*, para. 52.

477 In its judgment in *Evans v. the United Kingdom* Application No. 6339/05, ECHR 2007-IV, concerning an obligation to obtain the father's consent for the preservation and implantation of fertilised eggs, the Court summed up the issue of the width of the margin of appreciation in this Article 8 context as follows: '77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (*see, for example, X and Y v. the Netherlands*, 26 March 1985, §§ 24 and 27, Series A No. 91; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A No. 45; *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, § 90, ECHR 2002-VI). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (*see X, Y, and Z v. the United Kingdom*, 22 April 1997, para. 44, Reports of Judgments and Decisions 1997-II; *Fretté v. France*, Application No. 36515/97, para. 41, ECHR 2002-I). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (*see Odièvre v. France*)'.

478 *Bronda v. Italy*, Application No. 22430/93, para. 62.

- applicant and the context. It is for the state to justify the interference. Spielmann notes that the grounds ‘*must be “relevant and sufficient”, the need for a restriction must be “established convincingly”, any exceptions must be “construed strictly”, and the interference must meet “a pressing social need”*’.⁴⁷⁹
- v. For the purposes of Article 8 ECHR, the public policy of a Contracting State cannot be understood as being made exclusively of national principles and values.⁴⁸⁰ Rather, public policy represents for the Court a focus point where national values and supra-national imperatives including the CRC interconnect: public policy, in order to properly play a role in respect of the recognition of foreign judgments or civil status documents in matters of personal status and family relationships, should be treated ‘*as the result of a dynamic process of osmosis between local and regional policies [...] i.e. a perspective where the point of view of the forum is no longer a merely national one, but embodies that state’s international undertakings concerning, inter alia, the protection of human rights*’.⁴⁸¹
- vi. Together, the judgments of the Strasbourg Court in the context of the recognition or establishment of a parental status can stand for a general idea: a status validly acquired abroad, whether through a judgment or otherwise, is entitled to protection of and respect for private and family life.⁴⁸² There is no doubt in the reported cases that as far as those children are concerned their identity has already been formed as the children of the intending parents (one of whom usually has a genetic tie with the child) and the commissioning of their conception and birth. On that basis Contracting States are required to have in place a legal framework that ensures that family life can be meaningfully enjoyed by a child, with that framework reflecting family ties. An examination of the reported case law in Chapter Three revealed that the status of a surrogate-born child differed considerably from that of a child born in other circumstances and that, without the means to eliminate or reduce these differences, the absence of an appropriate legal framework arguably amounts to a failure to respect the child’s family life.

479 D. Spielmann, ‘Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ 2012 CELS Working Paper Series, 22.

480 P. Franzina, ‘Some remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad’ [2011] 5(3) *Diritti Umani e Diritto Internazionale*. See also M. Forteau, ‘L’ordre public ‘transnational’ ou ‘réellement international’: l’ordre public international face à l’enchevêtrement croissant du droit international privé et du droit international public’ [2011] *Journal du droit international*, 3 *et seq.*

481 P. Franzina ‘Some remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad’ [2011] 5(3) *Diritti Umani e Diritto Internazionale*.

482 See also P. Kinsch, ‘Private International Law Topics before the European Court of Human Rights Selected Judgments and Decisions (2010-2011)’ [2011] *Yearbook of Private International Law* 13.

As Franzina observes, there are two broad preconditions: the parties must have acquired the family status in good faith under the foreign system,⁴⁸³ and the parties' expectation of stability regarding their status must have been a legitimate expectation.⁴⁸⁴ Article 8 ECHR does not prevent Contracting States from resorting to any particular technique for the recognition of foreign judgments or civil status documents, provided that the overall operation of the relevant rules does not lead to a result inconsistent with the rights enshrined in the Convention. Good faith will depend on the parties' actions and the lawfulness of the arrangement in the jurisdiction in which the surrogacy arrangement takes place. Legitimacy will depend upon the intensity of the links with the foreign legal system under which the status was acquired. The mere fact that the parties' expectations are entitled to protection does not mean that they can never be disturbed. But such reasons for disturbing their expectations must be assessed against the parties' interests in the stability of their family status, in light of the principle of proportionality (balancing exercise of the interest of the community and the individuals). As concluded above, that a similar status could not have been acquired under the recognising forum's own system of law or public policy will not, in itself, be enough. Article 8, to put it otherwise, should merely rectify the '*functioning*' of the relevant PIL rules, '*whenever the latter bring about an illegitimate restriction on an established Article 8 right to respect for private and family life*'.⁴⁸⁵ The apparent paradox that results from the Strasbourg Court's approach is that a particular country's (PIL) rules may, on the basis of an Article 8 ECHR assessment, permit an activity that its own domestic laws may prohibit but this resulting dimension of PIL does not, however, conflict with the role and positive functioning of PIL.

- vii. The Strasbourg Court does not legislate. There are some things which ought to be decided by a democratically elected parliament rather than by a court, so long as that process does not abridge fundamental rights. Broadly, the law should not simply legitimise an offence nor should it be forced to recognise a practice which is prohibited.

⁴⁸³ *Wagner*, para. 155.

⁴⁸⁴ Similarly, as discussed at 4.14, the Court of Justice of the European Union has created a general principle of 'abuse of rights', by which EU Member States may impede 'nationals from attempting improperly to circumvent their national legislation or [...] prevent individuals from improperly or fraudulently taking advantage of [...] law'. Even if courts recognise and enshrine this exception, it is questionable whether it is operative as a means of control (and prevention). It has been explicitly proclaimed as a principle only recently, in case C-321/05 *Kofoed* [2007] ECR I-05795. See K. Sørensen, 'Abuse of Rights in Community Law: a Principle of Substance or Merely Rhetoric?' [2006] 43 Common Market Law Review 423, 425–27. Even though in traditional conflicts there is a subtle difference between 'abuse of rights' and 'fraud on the law' (see, e.g. E. Cornut, 'Forum shopping et abus du choix de for en droit international privé' [2007] 134 Journal de Droit International 27, paras. 10–15).

⁴⁸⁵ P. Kinsch, 'Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law' in K. Boele Woelki *et al* (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (The Hague, 2010), 272.

Legislatures are free to enact laws as long as those laws are rationally related to achieving legitimate aims. Restrictions on children's identity and other rights of fundamental importance and sensitivity, though, must satisfy a higher standard of proportionality. This standard does not prohibit a state from passing laws in order to achieve certain (ethical) objectives, but it does prevent legislature from imposing restrictions that have too little to do with the achievement of those normative goals. In cases where fundamental rights are at issue, proportionality requires that legislatures adopt the only or the least intrusive means of achieving the aim pursued.

The fact that, at the end of a gradual evolution, a Contracting State finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that, for example, that aspect conflicts with the ECHR, particularly in a field such as parenthood which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas and aspirations about the family unit.⁴⁸⁶ Asking herself if Strasbourg Court or the UK Supreme Court is Supreme, Baroness Hale proposes as follows: *'where it was necessary to strike a balance between competing Convention rights, the Court should be particularly cautious about interfering with the way in which the national courts have struck the balance when they have been applying the Convention principles and have reached a decision which is 'on its face reasonable and not arbitrary'*.⁴⁸⁷ Indeed, as the Strasbourg Court has observed, recognition of a foreign judgment may (and actually should) be denied in some circumstances.⁴⁸⁸

Surrogacy must be considered and approached on its special facts. If a child is born as a result of surrogacy, the child's best interests considered in the long-term must be of the highest priority. A decision taken by a state has and will have a fundamental impact on the future of the child. If the child has been entrusted to the intending parents, forcing the surrogate to take the child back or placing him or her into state care may not promote the child's welfare nor will criminalising a child's parents or the surrogate. *Paradiso* serves as a reminder of the dilemmas. Long-term solutions must be found in the best interests of the surrogate-born child. In establishing this position, the Strasbourg Court has expressed a strong awareness of the importance of legal recognition for family relationships, even if it has not applied this approach equally to all forms of family relationships. Although some exceptions are perhaps to be expected in what can be a sensitive area of national law and

486 *See F. v. Switzerland*, 18 December 1987, § 33, Series A No. 128, para. 33 (this case concerned limitations on the right to remarry).

487 B. Hale, 'Argentoratium Locutum: Is the Strasbourg or the Supreme Court Supreme?' [2012] *Human Rights Law Review* 65-78, 77.

488 P. Franzina, 'Some remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' [2011] 5(3) *Diritti Umani e Diritto Internazionale*. *See*, for further developments and in a different perspective, O. Lopes Pegna 'L'incidenza dell'Articolo 6 della Convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere' [2011] *Rivista di diritto internazionale* 54.

policy, it is patently clear that the positive obligations approach has been central to the articulation of state obligations under Article 8 ECHR, and in respect of developing the child's rights to identity and family life, it can also be said to have gone further than the CRC in this area.

4.11.5 *Towards a child-centred approach*

Given the effect of the Court's judgments in other Council of Europe States, those exercising restrictive laws and policies on surrogacy, as France and Switzerland do, will likely pull their practice around legal parentage in international surrogacy situations into line with the *Paradiso*, *Mennesson*, and *Labassee* decisions. This means the Court's judgments will impact on many more children than just those concerned in the reported cases. In its first decisions relating to inter-country surrogacy, the European Court of Human Rights has been bold in finding violations of the rights of the child. However, given the continuing growth of surrogacy and the wide range of human rights challenges it presents, it seems unlikely that this will be the last time the Court will engage with the complex child rights issues raised by inter-country surrogacy. Reaching solutions in these cases require careful attention to the individual relationships concerned and the responsibilities that arise from them for, whatever else happens, the child and his or her carers will need to continue their relationships together.

Whether surrogacy should be examined in isolation from other assisted reproductive issues is not for the Strasbourg Court to say. Given that the ECtHR's approach to children's cases has been somewhat unpredictable to date and the influence of the case law difficult to assess, it is difficult to foresee where the scope of the obligations may next be realised. Each case is decided on its merits and is dependent on the set of circumstances that bring each child applicant to Strasbourg. Nonetheless, challenges to the child's right to family life and right to identity associated with assisted human reproduction would seem likely, and here, a positive obligation approach that seeks to respect the child's rights in line with the CRC would bring added value to existing standards. The pressure to extend Article 8 case law to require states to give legal recognition to less traditional family forms is arguably growing, especially where children are affected. As Hodson has commented, albeit in the context of children forming part of LGBTI families, asking for good reasons why some children should enjoy lesser protection of their family rights seems a more pertinently child-centred approach to adopt.⁴⁸⁹

⁴⁸⁹ See L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' [2012] *International Journal of Children's Rights*.

4.12 THE CEFL PRINCIPLES

The principles of European family law regarding parental responsibilities drafted by the Commission on European Family Law⁴⁹⁰ (the 'CEFL Principles on Parental Responsibilities') should also be considered.⁴⁹¹ The CEFL Principles on Parental Responsibilities were devised by comparing national legislation, taking into account international instruments and searching for common ground as well as looking into the future. The CEFL's activities are intended to produce results that may be used for specific practical purposes. The CEFL Principles on Parental Responsibilities suggest how (European) family law should evolve and progress⁴⁹² and serve two purposes: firstly, they could be considered as recommendations and, secondly, they may be used as a model for legislative action.

Parentage as such is not dealt with in the CEFL Principles on Parental Responsibilities. The relevant international and European human rights instruments have profoundly marked Chapter II, which is devoted to the rights of the child. With its five principles, this chapter forms the main general part of the CEFL Principles on Parental Responsibilities. The rights of the child are always to be taken into account in all matters of parental responsibilities.

The Principles on Parental Responsibilities constitute the principal point of departure along which all other issues should be addressed. Principle 3:3 considers the best interests of the child as the primary consideration. It should be the ultimate, decisive reflection. The assessment of the child's best interests should always be made from the child's perspective, regard being his or her present and future interests and needs. It will not come as a surprise that the CEFL also leaves the content of the 'best interests of the child' undefined, as do the various international instruments and all of the national jurisdictions surveyed. As discussed above, the 'best interests of the child' is a changing notion, dependent not only on the prevailing values in the society in question as regards children but also on the individual child and his or her present situation (age, maturity, personality, needs, abilities, health, etc).

The CEFL Principles on Parental Responsibilities also contain a principle of non-discrimination. Children should not be discriminated against on grounds such as sex; race; colour; language; religion, political, or other opinion; national, ethnic, or social origin; sexual orientation; disability; property; birth; or other statuses, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities (Principle

490 For a discussion of the innovative work of the CEFL and its aims, see K. Boele-Woelki, 'The principles of European family law: its aims and prospects' [2005] 1(2) *Utrecht Law Review* 160. The CEFL has also prepared Principles on Divorce and Maintenance between Former Spouses and Principles on Property Relations between Spouses (available at: <<http://ceflonline.net/principles/>>).

491 Available at: <<http://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf>>.

492 For a detailed discussion of these principles, see K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Intersentia 2008).

3:5). This list is only indicative. Other grounds than the ones explicitly mentioned may, such as surrogacy, also constitute forbidden discrimination.

The child's right to be heard not only when a competent authority takes a decision but also outside of proceedings in situations where the holders of parental responsibilities make agreements or take decisions concerning the child has been acknowledged in Principle 3:6.

Under certain circumstances, a third person who has no legal ties with the child can also be attributed with and exercise parental responsibilities, e.g. the parent's partner. Parental responsibilities may in whole or in part be attributed to such a person (Principle 3:9). According to the CEFL Principles on Parental Responsibilities, it is also possible that there might be even more than two holders of parental responsibilities.⁴⁹³

Research into the effectiveness of national solutions in the field of family law can largely profit from the CEFL's results.

4.13 INTERNATIONAL COMMISSION ON CIVIL STATUS

Operating in a more restrictive forum, but still with great relevance, is the International Commission on Civil Status ('ICCS' or 'CIEC'). The ICCS is an intergovernmental organisation created by a protocol signed in Bern on 25 September 1950, made up of 14 member states⁴⁹⁴ and nine States with observer status,⁴⁹⁵ whose seat has been established in Strasbourg.⁴⁹⁶ The mission of the ICCS is to facilitate international cooperation in civil status matters and to further the exchange of information between civil registrars.

In relation to Germany, Greece, Luxembourg, the Netherlands, Spain, Switzerland, and Turkey, the CIEC Convention on the establishment of maternal descent of natural children (signed at Brussels on 12 September 1962) applies in cases where motherhood has been officially registered.⁴⁹⁷ Its relevance, however, to surrogacy is limited, such descent may, however, be contested (Article 1).

Following a request of the French National Section, a questionnaire was addressed to the National Sections of the other ICCS member states concerning their law and practice in the matter of surrogate motherhood, notably as regards the legality of surrogacy contracts and the registration of the birth of the child. On the basis of the replies received and other

493 K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Intersentia 2008), 65.

494 14 Member States: Belgium, Croatia, France, Germany, Greece, Italy, Luxembourg, Mexico, the Netherlands, Poland, Portugal, Spain, Switzerland, and Turkey.

495 9 States with observer status: Cyprus, the Holy See, Lithuania, Moldova, Peru, Rumania, the Russian Federation, Slovenia, and Sweden.

496 See <www.ciecl.org/Documentation/CLARCIEV-PresentationCIEC-CN-EN-Mexico-29.07.2007.pdf>.

497 Available at: <ciecl.org/Conventions/Conv06Angl.pdf>.

information in the possession of the ICCS, the Secretariat General prepared a synopsis, which extends also to more general questions relating to the establishment of maternal descent and, notably, anonymous childbirth. This synopsis, written in French and entitled '*L'établissement de la filiation maternelle et les maternités de substitution dans les Etats de la CIEC*' is updated to February 2014.⁴⁹⁸ No recommendations are presented as to how to respond to inter-country surrogacy.

4.14 EUROPEAN UNION

It has been observed in this thesis and elsewhere⁴⁹⁹ that EU Member States have been impacted by cross-border surrogacy and that in at least two Member States (the UK and Greece), surrogacy arrangements are permissible and subject to a legislative framework. An EU-funded research study⁵⁰⁰ has specifically considered the possibility of an EU response to the legal difficulties raised by surrogacy (hereinafter, the 'EU Research Study'). Before attention turns to consider the EU Research Study, an overview of the scope of the EU's actions in the field of family law is presented.

The EU's approach towards family law (including children's rights) has evolved.⁵⁰¹ Until the 1990s, the issue of children's rights was arguably less relevant for the EU agenda, not least because the EU had limited competence in the field of fundamental rights. However, children's rights have gradually taken on increased importance as a result of additional competences acquired by the EU in this field.⁵⁰² Indeed the European Commission has stated that the '*standards and principles of the CRC must continue to guide EU policies and actions that have an impact on the rights of the child*'.⁵⁰³ It must be acknowledged that when it comes to the regulation of matters relating to family relations, the role of the EU is much less visible. While recognising that the primary responsibility for many chil-

498 See <www.ciec1.org/Documentation/EVS-Congres7-Gand-14-15mai2007-MeresPorteusesExposeCNFrancais.pdf>; See Annual Report available at: <<http://ciec1.org/CIEC-note-information-ENG-MAJ-sept2013.pdf>>.

499 See, for a detailed analysis, the review requested by the European Parliament's Committee on Legal Affairs available at: <www.europarl.europa.eu/committees/en/juri/studies.html>.

500 L. Brunet *et al.* 'A Comparative Study on the Regime of Surrogacy in EU Member States', European Parliament (2013), available at: <www.europarl.europa.eu/committees/en/juri/studiesdownload.html?languageDocument=EN&file=93673>.

501 For the history, see E. Canetta *et al.* 'EU Framework of Law for Children's Rights', European Parliament (2012), available at: <[www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT\(2012\)462445_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf)>.

502 Article 81 of the Treaty of the Functioning of the European Union permits the Council to establish measures addressing the cross-border implications of family law when such implications are the subject of acts adopted by the ordinary legislative procedure.

503 European Commission (2011) Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child, COM(2011) 60, 3.

dren's issues lies at the national level, this lack of visibility also, in part, pertains to the limited competence of the EU legislator in the domain of family law. This means that if the EU has competence to consider a legislative response to surrogacy, its competence to do so is likely to be limited to the cross-border private international law aspects as discussed in Chapter Three. Yet as family ties are formed between nationals or residents of different Member States, the free circulation of decisions and civil status documents can be viewed as particularly important in the family law sphere and, as discussed in this thesis, to the topic of surrogacy.

A further introductory point should be made. Since the coming into force of the Lisbon Treaty provisions according the Charter of Fundamental Rights of the European Union (hereinafter, the 'EU Charter') with the same legal value as the EU Treaties, the Court of Justice of the European Union ('CJEU'), as a matter of course, refers to provisions of the EU Charter in its judgments. While the EU Charter constitutes a firm, legally binding reference point for the meaning and content of fundamental rights in the EU legal system, its scope of application remains limited, in the context of Member States' actions, to those cases when they are implementing Union law, as clarified by its Article 51.⁵⁰⁴ Nevertheless, any understanding of the intent and effect of EU law has now to be done against a background of an understanding of the terms of the EU Charter, as interpreted by the CJEU. And a proper understanding of the EU Charter's provisions also necessarily requires a proper understanding of the relevant Strasbourg case law since Article 52(3) EU Charter requires that those EU Charter rights which correspond to rights already guaranteed by the ECHR be given the same meaning and scope as, and no lesser degree of protection than, provided under the ECHR.⁵⁰⁵

4.14.1 *EU instruments relevant to family law*

When it comes to EU legislation in the field of family law, it is principally concerned with cross-border implications and the harmonization of PIL rules. Council Regulation 2201/2003 on jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility is the most well-known EU instrument in

⁵⁰⁴ Article 51(1) states: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles, and promote the application thereof in accordance with their respective powers.'

⁵⁰⁵ In *McB v. LE* C-400/10 PPU J, 5 October 2010 ECR I-nyr at para. 53, the CJEU ruled that where EU Charter rights paralleled ECHR rights, the Court of Justice should follow any clear and constant case law of the European Court of Human Rights. See, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, para. 48.

this area ('Brussels IIbis').⁵⁰⁶ Where it deals with the same issues as the 1996 Hague Child Protection Convention, Brussels IIbis applies (save in the case of Denmark) when the child concerned has his or her habitual residence on the territory of an EU Member State or when the case concerns the recognition and enforcement of a judgment delivered in a court of an EU Member State on the territory of another Member State.⁵⁰⁷ Brussels IIbis applies to the attribution, exercise, delegation, restriction, or termination of parental responsibility as well as to rights of custody and access.⁵⁰⁸ Brussels IIbis provides that the best interests of the child are an important and primary consideration.⁵⁰⁹ The hearing of the child also plays an important role in the application of the regulation as can be seen in recitals 19 and 20 of the Preamble and Articles 23(b), 41(2)(c), and 42(2)(a). Yet Brussels IIbis is unlikely to be of direct relevance to civil status in cases of surrogacy as Article 1(3) Brussels IIbis states that '*this Regulation shall not apply, among other matters to: (a) the establishment or contesting of a parent-child relationship.*'⁵¹⁰

In the field of maintenance, Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations (the 'Maintenance Regulation') provides that a maintenance creditor can obtain easily, in one Member State, a decision which will automatically be recognised in another Member State without further formalities (i.e. registration) (recital 9). The Maintenance Regulation applies to '*maintenance obligations arising from a family relationship, parentage, marriage or affinity*' (Article 1). Recital 11 provides that the term 'maintenance' should be interpreted autonomously and does not provide any further definition of the term. It will clearly apply to maintenance as between spouses, civil partners, and parents and children. The term 'affinity', though, may be applied more widely in different Member States to include decisions in relation to other types of relationships, perhaps also intending parents yet to acquire the status of parents under national law, which the courts of the Member States would arguably have to recognise even if that type of relationship does not exist under national law. Recital 21 makes clear that these rules are designed to apply only to maintenance obligations and do not determine the law applicable to the establishment of the family relationships upon which the maintenance obligations are based. Family relationships will still be determined by national law.

506 2003 Council Regulation (EC) No. 2201/2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, Official Journal L 338, 23/12/2003.

507 Article 61 Brussels IIbis Regulation.

508 Article 1(b) and 2(a) Brussels IIbis Regulation.

509 Articles 12(1)(b) and 15(1).

510 Similarly, Article 1(2)(a) Regulation (EU) No 650/2012 (known, colloquially, as the EU Succession Regulation) excludes from the material scope of the regulation 'the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects'.

In the context of surrogacy, the non-applicability of Regulation (EC) No 593/2008 on the law applicable to contractual obligations ('Rome I') should also be noted. By Article 1(2) Rome I, contractual obligations involving the status or legal capacity of natural persons (Article 1(2)(a), subject only to Article 13 'incapacity'), and contractual obligations arising out of family relationships (Article 1(2)b) are excluded from the scope of the regulation. This means that any court of an EU Member State currently would, in theory, apply its own (private international law) national rules pertaining to contractual obligations in order to assess the validity and enforceability of a cross-border surrogacy agreement. So too, in so far as any noncontractual obligations may be said to derive from inter-country surrogacy arrangements (e.g. a claim in unjust enrichment), it is important to note the non-applicability of Regulation (EC) No. 864/2007 on the law applicable to noncontractual obligations ('Rome II'). By Article 1(2)(a) Rome II, there are excluded from the scope of the instrument noncontractual obligations arising out of family relationships.

The EU is currently considering the possibility of facilitating the recognition of civil status documents within in the EU for the recognition of legal parentage between EU member states; it may well be that the status documents provide a mechanism for the effective recognition of parentage involved in surrogacy arrangements.⁵¹¹

4.14.2 *The child's rights*

The promotion of the protection of the rights of the child is one of the general objectives of the European Union. As stated in Article 3(3) TEU, the EU shall promote the protection of the rights of the child, and Article 3(5) TEU stipulates that in its relations with the wider world, the EU shall contribute to the protection of human rights, in particular the rights of the child. The rights of the child are guaranteed by the EU Charter.

Article 24(2) EU Charter is a restatement of Article 3(1) CRC and prescribes that in all actions relating to children, the child's best interests must be a primary consideration in all actions relating to children, that children have a right to such protection and care as is necessary for their well-being, and that views of children shall be taken into consideration on matters which concern them in accordance with their age and maturity. It also guarantees children the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.⁵¹² However, unlike the CRC, the EU Charter does not grant the child the explicit right to be heard in proceedings concerning him or her. Instead, Article 24(1) provides: '[Children] may express

⁵¹¹ See the EU Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) 1024/2012 (COM (2013) 228) available at: <[www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0119\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0119(COD))>.

⁵¹² Article 24(1) Charter and Article 12(1) CRC.

their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity’.

Aside from the rights of the child, the EU Charter also protects the integrity of persons⁵¹³ and private and family. Article 7 provides that ‘everyone has the right to respect for his or her private and family life, home and communications’. This provision is an exact replica of Article 8(1) ECHR. There is no reason to doubt that these rights apply equally to surrogate-born children habitually resident in the EU as they do to children born in other circumstances.

4.14.3 Parent-child relationship

Article 24(3) EU Charter provides that ‘every child [should] have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests’. This provision is based on Article 9(3) CRC, but unlike Article 9(3) CRC, Article 24 EU Charter applies to all children instead of children who are merely separated from their parents. In this context, discrimination based on sexual orientation is prohibited by Article 21 EU Charter, which distinguishes discrimination based on sex from that related to sexual orientation. The EU Charter offers no definition of the term ‘parent’.

While existing EU law is inapplicable in the context of the establishment or recognition of filiation⁵¹⁴ because the establishment of a parent-child relationship falls outside the material scope of all current regulations, it should be appreciated, however, that a matter is only excluded from the scope of the EU regulations to the extent that it is the central subject of proceedings, but not if it is merely an incidental issue in a judgment, the main object of which does fall within the scope of the EU regulations.⁵¹⁵ For example, it is possible that the recognition and enforcement of a Member State⁵¹⁶ maintenance judgment issued in favour of the child against one (or both) intending parents would be governed by the

513 Note that Article 3 of the EU Charter reads: ‘Article 3 - Right to the integrity of the person. 1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: the free and informed consent of the person concerned, according to the procedures laid down by law, the prohibition of eugenic practices, in particular those aiming at the selection of persons, the prohibition on making the human body and its parts as such a source of financial gain, the prohibition of the reproductive cloning of human beings’.

514 C. Campiglio, ‘Lo stato di figlio nato da contratto internazionale di maternità’ [2009] *Rivista di diritto internazionale private e processuale* 589, 597.

515 J. Fawcett and J. M. Carruthers, *Private International Law* (14th ed., Cheshire, North and Fawcett 2008).

516 This includes the UK and Denmark. See Commission Decision of 8 June 2009 on the intention of the UK to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (2009/451/EC), 2009 O.J. (L 149) 73; Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter, 2009 O.J. (L 149) 80.

Maintenance Regulation even if the establishment of the parent-child relationship was incidentally considered.⁵¹⁷ For parenting arrangements, there is little reason to question the applicability of the rules set out in Brussels IIbis to matters of parental responsibility relating to intending parents as no review as to the substance of the proceedings in the Member State of origin is envisaged by the regulation.

It should also be noted that the CJEU has considered in two rulings⁵¹⁸ matters relating to maternity or adoption leave for commissioning mothers. In the Irish case of *Z v. A Government Department and the Board of Management of a Community School*,⁵¹⁹ Mrs Z sought entitlement to adoption leave on the basis that a surrogacy arrangement should be treated as analogous to adoption and, therefore, has protection of the same employment rights in terms of leave. In the British case of *CD v. ST*,⁵²⁰ Mrs CD sought entitlement to maternity leave. Both national courts made reference to the CJEU for a preliminary ruling. The crux of the question put to the CJEU is whether, as a matter of EU law, the British commissioning mother entitled to a period of maternity leave by virtue of Council Directive 92/85/EEC (the 'Pregnant Workers Directive') and/or Directive 2006/54/EC (the 'Recast Directive').

While the UK referral to the CJEU in the case of *CD v. ST* was successful on the construction of EU law, the Irish referral in *Z v. A Government Department* was unsuccessful. Given the similarities of the two cases, it would appear surprising that the same court could reach different conclusions yet the differences in the two outcomes can be understood in the context of the differences in the national laws on surrogacy, maternity, and adoption rights as well as the way in which the two claims were framed. In the UK, as discussed in Chapter Three, surrogacy is legal although commercial surrogacy is prohibited under the Surrogacy Arrangements Act of 1985. The surrogate is recognised as the legal mother at birth under statutory law.⁵²¹ In Ireland, while the decision of *MR & Anor v. An tard Chlaraitheoir and Others*⁵²² (in which the Court at first instance held that a commissioning mother in a gestational surrogacy arrangement could be recognised as the legal mother), the Status of Children Act of 1987 provides that the surrogate is regarded as the legal mother. Therefore, both the UK and Ireland recognise the surrogate as the legal mother at birth regardless of whether the commissioning mother has a genetic connection with the child.

The issue of the legal recognition of motherhood in a surrogacy arrangement was central to the issue of whether the two commissioning mothers should receive the same

517 R. Baratta, 'Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC' [2007] IPRA 4-11.

518 Both references are available at: <http://curia.europa.eu/jcms/jcms/j_6/>.

519 [2013] No C-363/12.

520 [2013] No C-157/12.

521 Section 33 HFEA 2008.

522 [2013] IEHC 91.

rights available to biological mothers and, in the case of Ms Z, whether she should receive the same rights as an adopted mother in terms of employment leave. Neither country had express legislative provisions on a commissioning mother's entitlement to leave in the context of a surrogacy arrangement. In addition, unlike the UK, Ireland had not brought adoption leave in line with maternity leave. Advocate General Wahl's ruling was influenced by the fact that Ireland had not given adoptive parents the same leave entitlement as natural parents and as such Ms Z could not say that her position should be harmonised. However, in Mrs CD's case, the CJEU was conversely influenced by the fact that surrogacy was legal in the UK and that the surrogacy laws were harmonised with the adoption laws.

In *CD* and *Z*, the Grand Chamber established that, as a matter of EU law, only women who themselves give birth to the child can benefit from maternity leave. Two Advocate Generals, Wahl and Kokott, issued opinions and came to opposing conclusions. The Court followed Advocate General Wahl in its judgment. The CJEU found that the Pregnant Workers Directive (and the Recast Directive) only applies to women who are in fact pregnant. The Sex Discrimination Directive was found not to be applicable either as the commissioning mother of a surrogacy agreement would be in the same position as a commissioning father. Having found that the question fell outside of the ambit of EU law, the CJEU also found the EU Charter to be inapplicable. As regards the Pregnant Workers Directive, the CJEU said that the objective of that directive was '*to protect the woman during a period when she is particularly vulnerable both before and after confinement from [...] pregnancy*'⁵²³ and that maternity leave was concerned only with the period after '*pregnancy and childbirth*'.⁵²⁴ Thus, the grant of maternity leave presupposed that the worker concerned had been pregnant and had given birth to a child. This was so even in a case (such as *C.D.*) where the commissioning mother had breast-fed the child following the birth. In the *Z* judgment, the CJEU further clarified that the Framework Equality Directive and its provisions on disabilities do not apply to women unable to become or carry out a pregnancy as the directive only targets disabilities that render a worker's involvement in professional life more burdensome, which is not the case for medical conditions that prevent women from getting pregnant or carrying out a pregnancy. As regards the Equal Treatment Directive, the Court held that a refusal to grant maternity leave to a commissioning mother did not constitute discrimination on grounds of sex, given that a commissioning father was not entitled to such leave either. Further, the refusal did not put female workers at a particular disadvantage compared with male workers, so there was no indirect sex discrimination. In so far as the right to adoption leave was concerned, the CJEU confirmed that member states were free, under EU law, to choose whether or not to grant adoption leave to workers. EU law merely required that if such leave was

⁵²³ Para. 45 of the Opinion of Advocate General Wahl in *CD v. ST* [2013] No C-157/12.

⁵²⁴ *Ibid.*

granted, the workers concerned should be protected against dismissal and should be entitled to return to their jobs or equivalent posts after taking adoption leave.

Advocate General Kokott came to the opposite conclusion to the CJEU.⁵²⁵ Going beyond a literal reading of the directives, she argued in her opinion that the women at issue should be able to benefit from – some – maternity leave. Indeed, most European legislations on maternity leave seem to be based on two rationales: first that a woman needs time to recover from the strains of pregnancy and childbirth, which undoubtedly does not apply to those that do not themselves carry out the pregnancy, and, second, that a newborn needs permanent attention and care and that hence, in the interest of the child, mothers (and in ever more Member States also fathers) should be able to watch over them on a constant basis for the first weeks or months of their lives.

Whereas Advocate General Kokott recognises that surrogacy is a phenomenon unknown to the Pregnant Workers' Directive, she identifies that one of the motivations behind it is to '*protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth*'.⁵²⁶ In concluding that a woman who did not carry out her own child should nonetheless be able to take maternity leave as '*precisely because she herself was not pregnant, she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother. This "special relationship between a woman and her child over the period which follows pregnancy and childbirth" warrants protection in the case of an intended mother in the same way as it does in the case of a biological mother*'.⁵²⁷

Bearing in mind the rationale behind maternity leave, Advocate General Kokott suggests that it may be split between the woman who gives birth (to recover from pregnancy and childbirth) and the legal mother (to care for and bond with the newborn). This appears to be a sensible conclusion in principle, and, indeed, arguably promotes the welfare of the child following birth, given that parents who adopt usually get such time. If a Member State however decides to legalise the practice, the surrogate-born child and his or her family unit should be able to benefit from the same attention and care during the first weeks and months of his or her life as any other baby.

The British government has declared its intention to introduce legislation to harmonise employment leave and pay for commissioning mothers. Even before the CJEU delivered its ruling, a Private Member's Bill, Surrogate Parents (Leave, Pay and Allowance

525 Available at: <<http://curia.europa.eu/juris/document/document.jsf?text=surrogacy&docid=142184&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=299104#ctx1>>.

526 *Ibid.*, Sharpston, para. 45.

527 *Ibid.*, Sharpston, para. 46.

Arrangements) Bill 2010-2012, was introduced in the UK Parliament on 17 April 2012 but the Bill failed during its passage through Parliament.⁵²⁸

The result of this analysis leads to the conclusion that current EU law does not in any way preclude Member States from applying or introducing laws, regulations, or administrative provisions more favourable to the protection of the safety and health of intending mothers who have had babies through a surrogacy arrangement by allowing them to take maternity leave as a result of the birth of the child. These cases also serve as reminders to intending parents that they may not be eligible for national parental or family leave schemes in advance of and following the birth of their children.

4.14.4 *Relevance to surrogacy*

In examining the development of surrogacy, the developments in the EU should be noted. There is (again incomplete) evidence of a growing number of intending parents resident in an EU Member State seeking to find a surrogate in an EU Member State and elsewhere.⁵²⁹

The European Commission set up a working party chaired by Jonathan Glover to examine the ethical, social, and medical problems generated by the new reproductive technologies. The working party's report was published in 1989. The Glover Report⁵³⁰ endorsed a restrictive approach to surrogacy in the interests of protecting surrogates from exploitation and children from possible prolonged battles between the surrogate and the intending parents. Commercial agencies should be prohibited, and the surrogate should not be contractually bound to hand over the child. Payments beyond expenses were to be discouraged. However, the Glover Report did not seek to exclude the establishment of 'public' agencies to assist in surrogacy where clear medical reasons prevented the intending

528 The Bill failed to complete its passage through the British Parliament before the end of the session. This means the Bill will make no further progress.

529 See Chapter Three (e.g. Belgium and the UK) and L. Brunet *et al.* 'A comparative study on the regime of surrogacy in EU Member States', European Parliament (2013) available at: <www.europarl.europa.eu/delegations/sv/studiesdownload.html?languageDocument=EN&file=93673> (the 'EU Research Study').

530 J. Glover *et al.* *Ethics of New Reproductive Technologies: The Glover Report to the European Commission* (DeKalb, Ill., Northern Illinois University Press 1989). The Glover Report gives an international (European) view of the vexing ethical issues raised by reproductive technology. Artificial insemination, in vitro fertilization, surrogacy, genetic engineering, and the experimental use of foetal tissue are the techniques covered. The report's recommendations, succinctly stated in the final pages, include proscribing commercial surrogacy; establishing governmental agencies to screen, counsel, and follow surrogate mothers; monitoring research on pre-embryonic and embryonic tissue; allowing the use of foetal tissue for transplantation; and aborting the development of seriously handicapped fetuses. Committee members did not completely agree on these conclusions, nor will many others.

mother from bearing a child. More recently, an EU Research Study⁵³¹ and others⁵³² have investigated the potential remit and possible scope of action of the EU on the topic of surrogacy. The EU Research Study concludes as follows:⁵³³

- i. That only very limited statistical data is available across the EU and recommends that improved systems need to be put in place to routinely collect accurate quantitative information.
- ii. Further empirical research into the policy concerns relating to surrogacy as a practice on both the national and global level these concerns, particularly those relating to health policy and gender, is recommended. In particular, qualitative research on the experience of surrogacy would add an invaluable perspective for future policy and legislative work in this area.
- iii. The EU has the competence to legislate in the field of surrogacy. On the basis of Articles 67(4) and 81 TFEU, harmonised conflict rules or rules on mutual recognition with respect to parentage could be introduced. And mirroring other EU PIL instruments, issues of jurisdiction and applicable law could also be included. In the context of cross-border surrogacy, in the event of policy difficulties liable to make unanimity of response among all Member States impossible, it is possible that the enhanced co-operation⁵³⁴ procedure could be a legislative option.
- iv. While the EU remains a relevant place for action given the existing differences between Member States, the multiplication of questions sent to the ECtHR and the *sui generis* effective legal order that the EU proposes, it may not necessarily be the most appropriate level at which to regulate. Indeed, the study concludes that the EU is unlikely to regulate surrogacy, because of the great diversity of legislation in the Member States.
- v. The concern for the child's welfare is the instrument that might be leveraged to lead to a *rapprochement* in policies on surrogacy throughout the EU. The point is not to seek a single *ex ante* framework for surrogacy agreements, but to try to settle *ex post facto* the status of children born as a result of such agreements.

As the EU Research Study sets out, the EU has a shared internal competence in the area of PIL based on Article 81 TFEU in connection with Article 4(2)(j) TFEU. Article 81 TFEU offers a broader legal basis than for intra-European cases only, since it no longer imperatively demands fulfilment of the internal market requirement and because it forms part of the area of freedom, security, and justice. Based on this internal competence, the Euro-

531 EU Research Study.

532 E.g. V. Todorova, 'Recognition of Parental Responsibility: *Biological Parenthood v. Legal Parenthood*, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU action?', October 2010 available at: <www.europarl.europa.eu/studies>.

533 EU Research Study, 'Conclusion and summary of recommendations' 193-199.

534 Article 20 TEU in conjunction with Article 328(1) TFEU.

pean legislator has competence to adopt various kinds of measures, including regulations which would appear to be the most preferable for reasons of legal certainty, being directly applicable in the Member States and having primacy over national law. For completeness, the EU also has an implied exclusive external legislative competence to negotiate and conclude international agreements in the area of PIL based on Article 216 in connection with Article 3(2) TFEU.⁵³⁵

There is another area in which EU law may prove to be relevant and that it is the context of a Member State's assessment of public policy. Public policy is a concept which is specifically articulated in the EU treaties. In particular, it allows restrictions of the fundamental freedoms. To the extent that violations of public policy exist national legislatures may adopt restrictions. However, it is ultimately for the CJEU to determine whether a particular restriction is justified on this ground. At the European level, public policy is no longer only understood as an instrument for the protection of Member States' values; the content of public policy has become increasingly European. It follows that public policy takes its meaning from basic values of primary EU law, the EU Charter and the ECHR. This European understanding of public policy limits the applicability of national conceptions of public policy in the application of EU law. In the EU, the European Commission seeks to limit the availability of a national public policy to refuse recognition of decisions made in other Member States. Broadly, in the interest of a uniform judicial area there is to be unrestricted recognition; domestic and foreign decisions are to be put on the same footing. The success of this model depends on uniform standards of judicial protection throughout the Member States. Several regulations have moved towards the Commission's ideal of the abolition of public policy as a tool allowing Member States to deny recognition to foreign judgments.⁵³⁶ In so far as the public policy clause is still available, there are attempts to restrict its application to exceptional cases. In addition, attempts have been made to define as far as possible the cases where a violation of public policy can occur.

535 Member states are only allowed to amend or to negotiate and conclude bilateral agreements in the area of specific international family law matters if they comply with the requirements of Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between member states and third countries concerning jurisdiction, recognition, and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.

536 *E.g.* the Maintenance Regulation (although it must be noted that the position with respect to decisions made in member states not bound by the 2007 Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC) (OJ 16.12.2009 L 331/17). *See* Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC) (OJ 16.12.2009 L 331/17). The Protocol is an optional part of the 2007 Hague Convention. Where EU member states are concerned, the Maintenance Regulation takes precedence over the Convention (*see* Article 69(2)). For further detail as to the 2007 Hague Convention and Protocol and the Maintenance Regulation, *see* D. Eames, 'Maintenance Enforcement: The 2007 Hague Convention and the EC Regulation' [2009] *International Family Law* 47.

This further reduces the incidence of public policy as a defence to the recognition of foreign judgments.

The CJEU has not yet been asked to consider the civil status of a child born following a surrogacy arrangement. Given the possible cross-border mobility of these children and their families, it should be asked whether EU law obliges Member States to recognise the civil status of a surrogate-born child and the consequences resulting from the parent-child relationship. Take, for example, a lawful surrogacy in the UK undertaken, say, by a British couple with the family unit resident in France and the non-recognition by a French court of the parental status of the intending mother.⁵³⁷ If exercising the right to free movement results in the non-continuity of someone's personal status due to recognition of such a status in the one Member State and non-recognition in another that result may be considered as a restriction of that person's right to free movement. This means that EU law,⁵³⁸ as a result of the right to freedom of movement, might, nonetheless, affect in certain circumstances the recognition policy in a Member State.

There are broad lessons to be drawn from the case law of the CJEU. The CJEU has decided that the exercise of the right to move and reside freely within the EU (Article 21(1) TFEU) is hampered if a child is obliged to use a surname in a Member State (Germany), of which he and his parents are nationals, that is different from the double-barrelled surname conferred and registered in another Member State (Denmark), where he was born and always lived. In *Garcia Avello*,⁵³⁹ the CJEU considered the disproportionality '*all the more evident*' because, in that case, Belgian law does allow changes in surnames in exceptional circumstances. Likewise, in *Grunkin and Paul*,⁵⁴⁰ the CJEU sustained that the practice could not be necessary given that the connecting factor of nationality under German PIL for the determination of a person's surname is not without exception and that Germany does allow its nationals to bear double-barrelled surnames in certain circumstances. The Court decided that '*[i]n circumstances such as those of the case in the main proceedings, Article [20 TFEU] precludes the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth*'.⁵⁴¹

537 Example inspired by the case of *CC v. DD* [2014] EWHC 1307 (Fam) discussed in Chapter Three at 3.8 (UK).

538 Whether or not a person who resides in Europe can rely on specific provisions in EU law such as the right to free movement depends on the status of that person in the EU, *i.e.* an EU citizen or a third-country national. EU citizens and specific categories of third-country national family members who are allowed to accompany or join them such as spouses, recognised registered partners, dependent children, etc., are entitled to the right to move and reside freely within the territory of the member states of the EU pursuant to Article 21 TFEU and Article 45 EU Charter. See M. Wells-Greco, 'Citizenship and Free Movement Rights: beyond Economic Links' in M. Horspool and M. Humphrey (eds.) *EU Law* (8th ed. OUP: 2014).

539 C-148/02.

540 C-353/06.

541 *Ibid.*, para. 39.

In the aftermath of *Garcia Avello*, some commentators have considered the extent to which that decision could apply to other elements of a person's civil status.⁵⁴² After all, the non-recognition of parentage or, say, a marriage is likely to have a far greater restrictive effect on free movement than a limping surname. Others have been more cautious reflecting that the decisions regarding the name of a person should not necessarily be extended to other matters.⁵⁴³ In *Sayn-Wittgenstein*, a national restriction on the use of titles of nobility was upheld by the CJEU.⁵⁴⁴ The case concerned an Austrian citizen who was adopted by a German national whose surname had ties to nobility. Under Austrian law, a title of nobility, as part of a surname, is prohibited, and therefore, when the applicant's new name was registered in Austria, it was subsequently corrected to remove the part indicating nobility. The Austrian Court asked whether the legislation concerned restricted the right of free movement and residence for EU citizens. The CJEU answered in the affirmative, stating that the law in question did restrict the right to free movement under Article 21 TFEU. The CJEU decided that such a restriction of Article 21 TFEU is permitted if it is based on the Member State's constitutional law and '*provided that the measures adopted by those authorities in that context are justified on public policy grounds*'.⁵⁴⁵ However, the public policy restriction⁵⁴⁶ was permissible as it was proportionate.⁵⁴⁷ This taking into account of the national identity of the member states does not modify the solutions resulting from the above mentioned cases *García Avello* and *Grunkin and Paul*. In these cases, the CJEU refers to the 'serious inconvenience' test with regard to the difference in treatment regarding surnames and free movement in the context of the citizenship of the European Union. In *Garcia Avello* the CJEU pointed out that the difference in surnames may cause serious inconvenience for the children involved, as it did in the case in *Grunkin Paul* as a result of the boy having different surnames. However, in another decision (*Runevič-Vardyn*⁵⁴⁸), the Court left it to the discretion of the national court to perform the 'serious inconvenience' test.

542 G. de Groot and S. Rutten, 'Op weg naar een Europees IPR op het gebied van het personen- en familierecht' [2004] 22(3) *Nederlands internationaal privaatrecht*, 273-282. See also K. Saarloos, 'European private international law on legal parenting? Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting' (Maastricht University 2010), 346.

543 C-353/06, *Grunkin-Paul*, 2008 E.C.R. I-7639, Opinion of AG Sharpston.

544 C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*.

545 *Ibid.*, para. 95.

546 Law on the abolition of the nobility constitutes implementation of the more general principle of equality before the law of all Austrian citizens, a principle which the EU legal system seeks to ensure as a general principle of law.

547 See also C-391/09 *Runevič-Vardyn* (2011). The case involved a request from Mrs Runevič-Vardyn, a Lithuanian national belonging to the Polish minority in Lithuania, and her husband, a Polish national. Mrs Runevič wanted her name to be spelt using the Polish alphabet.

548 *Ibid.*

In *Ruiz Zambrano*,⁵⁴⁹ the Court affirmed that a third-country national, a (Colombian) father of two minors who were able to gain Belgian nationality because of the combined effects of Belgian nationality law (geared towards the prevention of statelessness) and Colombian nationality law (requiring registration after birth), could rely on Article 20 TFEU for a right of residence ‘*in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen*’ and could obtain a work permit in the Member State (Belgium) of which country his minor children (unlike their Colombian father) held nationality. It has been recognised that this decision may have considerable implications for the construction of Union citizenship and for those EU citizens who have not availed themselves of free movement rights. Conceivably, this decision also has wider implications for EU PIL, given the divergent approaches to the establishment of legal parentage. To give one example, if Dutch intending parents enter into a surrogacy arrangement with a UK resident national surrogate and have their (genetic) child registered in England, they will still not be recognised automatically as the legal parents in the Netherlands.⁵⁵⁰ The establishment of legal parentage and its recognition could be brought directly into the legal sphere of EU citizenship rights.

It seems that the CJEU has stopped in a certain way the potential emergence of a general principle of full recognition of all foreign civil status situations through case law. The CJEU has held that the Member States are in principle free to determine according to their own conceptions, what public policy requires. That concept of public policy justifying a derogation from a fundamental EU freedom must be interpreted strictly and cannot be determined unilaterally by each Member State. Nevertheless, the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one decade to another. The national authorities enjoy a margin of discretion within the limits imposed by the EU treaties. Therefore, any influence of Union law on the application of the public policy exception does not focus on the contents of the exception, but on its form or, in the words of the Court, on the limits of that concept.⁵⁵¹ The criterion to be applied is, according to the Court in *Krombach*:

Whether the recognition [...] would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement

⁵⁴⁹ C-34/09.

⁵⁵⁰ See more examples in K. Saarloos, ‘European Private International Law on Legal Parenting? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition in Legal Parenting’ (Maastricht University 2010), 346.

⁵⁵¹ C-7/98 *Krombach v Bamberski*, Rec. 2000, p. I-1935. The Member States are also obliged to use their public policy exception to enforce Union law: ECJ 9 November 2000, case C-381/98 (*Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*), Rec. 2000. I-9305.

would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.⁵⁵²

It has been discussed that the application of the public policy exception may not always lead to a violation of fundamental rights that are protected *inter alia* by the EU treaties (or the EU Charter read in conjunction with Article 8 ECHR). Thus, the refusal to recognise legal parentage that has been established abroad may not *prima facie* lead to an unjustified infringement of existing family life. Yet the judgments in *Grunkin-Paul* and *Sayn-Wittgenstein* read together suggest that the CJEU will not allow the Member States to label rules of national law with a public policy label as they see fit if there is an unjustified restriction of the right to free movement guaranteed by Article 21 TFEU, which causes serious inconveniences. The CJEU will examine whether the reasoning on the basis of which the national authorities conclude that legal parentage that has been established abroad violates national public policy can stand the test of rule of reason. Thus, in more general terms, the authority which invokes the national public policy exception must be able to explain which objective it serves and the non-recognition on the basis of public policy must be a suitable means to attain the objective.

It can be concluded that the scope of application of the principle of mutual recognition can be limited by, first of all, the lack of a restriction that causes serious inconveniences and, second, the public policy (as objective considerations that justify the restriction) of the state of recognition, although the public policy exception has to be interpreted strictly. Furthermore, the application of the principle of mutual recognition requires a sufficient or serious link between the situation and the state of its origin and between the situation and the state where recognition is sought in order to avoid fraud, abuse of law, or forum shopping.

Let us continue with the example above to give an idea of how the public policy exception might operate. In France, the courts have refused to recognise the legal maternity of an intending mother that has been established under English law. If EU law is involved, which is the case if the child moves from the UK to France, it must be observed that France would be free, according to the CJEU's explanation of public policy in *Krombach*, to determine what its public policy requires. Given the French prohibition of surrogacy, it has been discussed in Chapter Three that French public policy prohibits surrogacy based on the principle of the inalienability of the human body and that of the inalienability of personal status. However, the right of birth mothers to give birth anonymously and the rules on apparent status in France are hard to reconcile with the prohibition to establish the legal maternity of the intending mother. After all, although the right and the prohibition

⁵⁵² C-7/98 *Krombach v. Bamberski*, para. 37.

stem from completely different policies, it is known that they can and are combined in order to execute surrogacy arrangements.⁵⁵³ Looking at the case *in concreto*, and applying the 'serious inconvenience' test, it is difficult to sustain an argument that the public policy restriction on recognition is proportionate. Moreover, in the case where a surrogate-born child moves from the UK to France with his or her EU national family, France cannot apply a public policy argument to refuse the recognition of the acquisition of the nationality of another Member State.⁵⁵⁴ That being so, if, in another context (e.g. succession law or rights of custody), determination as to whether or not a parentage tie exists between the child and the intending parents, the obligation to recognise the child's nationality of another Member State limits the use of the public policy exception. Any other approach would be inconsistent.

A further tentative conclusion would be that the non-recognition in one Member State of a parental status established in another Member State is very likely to have the '*serious inconvenience*' for a child given that the child will have different parents in different states with all the legal and social difficulties that such a limping personal status creates. If a case concerning the non-recognition in one Member State of a status lawfully obtained in another Member State is brought to the CJEU, it is possible to sustain an argument that the consequence of the non-recognition is an obstacle to the freedom of movement unless the non-recognition can be justified based on objective considerations and is proportionate to the legitimate aim pursued.

EU law may, therefore, prove to be relevant in terms of the recognition of parental and civil statuses. While EU action in the area of harmonised PIL rules on parentage and civil status could be considered, it is suggested that a global approach is likely to be more effective to respond to global surrogacy practices. The use of regional systems of law to address important issues could exacerbate differences between the regions, rather than reinforce those universal standards that may be necessary to deal with issues including parental status and nationality. This cautious view is particularly pertinent mindful that there is a seemingly greater interest in surrogacy beyond the Union's borders. This is considered further in Chapter Six.⁵⁵⁵

⁵⁵³ See the discussion with respect to the Netherlands in Chapter Three at 3.7.

⁵⁵⁴ C-200/02 *Zhu and Chen* [2004] ECR I-9925.

⁵⁵⁵ This opinion is shared by the authors of the EU's Research Study 'A comparative study on the regime of surrogacy in EU Member States' [2012] available at: <www.europarl.europa.eu/committees/en/juri/studies.html>.

4.15 CONCLUSIONS AND RECOMMENDATIONS

An examination of the reported case law in Chapter Three revealed that the status of a surrogate-born child at birth differed considerably in most cases from that of a child born in other circumstances, often without a legal framework or means to eliminate or reduce these differences. Human rights law provides universal standards that are applicable to all persons. While the means to achieve human rights guarantees can – and should – be locally appropriate and contextually determined, the universality of their applicability to all persons, including children, is indisputable. This chapter has sought to determine how best to understand and to protect the rights of children in inter-country surrogacy by providing content to the standards and principles set out in European and international law. It is worth repeating that when states ratify international human rights treaties, they are legally bound to ensure that their national laws, policies, and practices do not conflict, and are consistent, with their obligations under international law.⁵⁵⁶ Human rights standards are not just about requiring states to refrain from interfering with an individual's human rights but also, in certain circumstances, these standards oblige states to ensure that individuals' rights are protected and fulfilled. This is of crucial importance because this research has identified examples of how the practice of surrogacy raises clear human rights issues.

The analysis of regional and international initiatives relevant to the subject-matter concludes that little work has yet been undertaken at the global level towards a comprehensive identification and application of internationally recognised standards in the fields of legal parentage and civil status and, more generally, the rights of surrogate-born children.⁵⁵⁷ It has also been observed that the relevant international (non-regional) treaties (e.g. the CRC and the Hague Children Conventions) while binding in character are not supported by associated enforcement mechanisms. Yet, it would be incomplete to suggest that no trends can be observed or conclusions reached. It has been demonstrated that there is a children's right imperative to work concerning legal parentage, the identity rights of these children and to ensuring that all children enjoy legal continuity in their civil status and equal opportunities in order to allow them to develop their full potential. That being so, a surrogate-born child's best interests *may* demand an order, extinguishing the legal rights and responsibilities of the surrogate and vesting such rights and responsibilities in the intending parents. It is clear that certainty in parentage is a prerequisite to a child's enjoyment of many of his or her rights, and, as a result, a state's domestic law and public policy considerations must be considered in respect of the children's rights mentioned above.

⁵⁵⁶ Article 7 Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

⁵⁵⁷ And, as discussed in Chapter Five, nationality.

From the perspectives of the surrogate, intending parents and gamete providers, it has also been demonstrated that there is a broader human rights imperative in the field of inter-country surrogacy. International human rights law can be harnessed to provide protection for the rights of the child which also balances the rights of the child and the competing rights of others. Indeed, from the discussion in Chapter Three and this chapter, a number of standards are identifiable which appear to be particularly relevant to understanding a state's obligations and responsibilities towards these children and the interpretation of public policy in the context of surrogacy.⁵⁵⁸

4.15.1 *The influence of European and international human rights law on surrogacy*

Surrogacy is a complex issue that can be considered from a number of different perspectives including private law on parentage, human rights, crime control and criminal justice, sexual exploitation, and labour. While no international instrument explicitly addresses surrogacy, many address rights crucial in this context, including the right of children to protection from all forms of discrimination; the best interests of the child to be the primary consideration in all actions concerning or impacting upon children; the prohibition on the illicit transfer of children abroad; the right of children to be protected from economic exploitation; the right of children to be protected from sexual exploitation and sexual abuse; the right of children to be protected from sale or trafficking; the right of children to be protected from other forms of exploitation; the child's right to information about the child's origins; the right to private and family life; and, as discussed in Chapter Five, the right of children to a nationality and the right to preserve that nationality. However, it has been discussed that the scope and extent of human rights protection for these children and, more broadly, for each of the parties to the surrogacy arrangement, remains controversial, uneven, and, in many cases, uncertain.

A careful legal analysis of the existing international human rights law in this area shows, however, that the identified human rights standards only in exceptional cases provide clear and legally binding obligations for states. None of these human rights is absolute. The desire to have a child cannot justify the exploitation of surrogate mothers or any form of inhuman treatment of children. In other words, all human rights cited above have to be balanced against legitimate public interests, as enumerated, for example, in Article 8(2) ECHR, and against other human rights of the child and other persons involved. Reflecting

⁵⁵⁸ These comments arguably are also of wider relevance in other sensitive child-related issues such as anonymous birth and 'baby-boxes'. In certain states (mostly in Central and Eastern Europe) allow parents to leave children anonymously in the care of the state. Baby-boxes most commonly take the form of an incubated crib or in a hospital or a child welfare system.

on the national reviews conducted in Chapter Three, it is clear that whatever approach a state takes towards surrogacy, the question of its compatibility with human rights law will continue to arise.⁵⁵⁹ In unravelling the complexities of laws around parentage and surrogacy, the following guiding principles and standards can be observed:

- i. The history of parentage is one of both continuity and change. That status has evolved over time.
- ii. The guiding principle for all decisions about children should, as has been seen, be the best interests of the child. That principle has not been reduced to any formula. The identification and protection of fundamental rights and principles is an enduring part of the judicial duty.
- iii. Children are entitled to certainty about their civil status. Rather than the issue being about conferring parental rights, it is about establishing parental responsibility.
- iv. The law should aim to eliminate all forms of discrimination, including discrimination based on family type and relationship status. Distinctions between children arising from AID, ova donation, IVF, etc., might constitute discrimination on the grounds of birth. All children must be treated substantially equally, irrespective of the circumstances of their birth. That purpose is consistent with treating the child born with a genetic link or an adopted link in substantially the same as a child born as a result of surrogacy.
- v. A child has a right to information about his or her origins and that right needs to be considered in light of that child's and other interested person's right to privacy.
- vi. No person should be exploited for their reproductive capabilities, for example, in trade.
- vii. No woman should ever be forced to relinquish the child she gave birth to against her free will.

It can be concluded that if the protection owed to surrogate-born children and the parties to the surrogacy arrangement under existing human rights instruments such as the CRC, CEDAW, ECHR, and ICCPR is further elucidated and the answer to the question how best to realise these standards in the context of surrogacy is clarified; then the current human rights framework seemingly provides adequate opportunity for the protection and realisation of these rights.⁵⁶⁰ If, on the other hand, a new international instrument, for instance, a catalogue of specific rights, was to be expounded, careful thought would have

559 Y. Ergas, 'Thinking "Through" Human Rights: the Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 27, 427. Ergas asks: 'Can and, More to the Point, Should, International Human Rights Law Inform the Regulation of International Reproductive Surrogacy?' Ergas observes that: 'International human rights law sets parameters within which any international agreement will have to be situated and by which it will ultimately be evaluated.'

560 See the recommendations in Chapter Six.

to be given to ensure that such any instrument does not duplicate the scope of or contradict existing international standards.

4.15.2 *The importance and elements of unconditional and informed consent*

It has been observed that (international) commercial surrogacy is particularly problematic for two reasons. First, there is argument that it is objectionable because it reinforces gender inequality and, in broader terms depending on the states involved, cultural imperialism. Second, such arrangements can lead to the potential exploitation of surrogate mothers (particularly in developing states). This creates the prospect that it may be both inconsistent with human rights law to envisage the adoption of an international instrument that would address the complex issues arising from surrogacy arrangements – short of an absolute ban – as is the case with commercial adoptions under the Hague Adoption Convention. Indeed it has been discussed that international law provides that a state can restrict a person's right to respect for private and family life where this is necessary to protect public morality. Although the ethical status of commercial surrogacy relationships is contested, the margin of appreciation accorded to states when implementing their human rights obligations, including the respect for the dignity of all persons, is such that they could still rely on arguments to justify the prohibition of commercial surrogacy. States have a due diligence obligation in this regard.⁵⁶¹ As discussed in 4.9, the scope of the Palermo Protocol and the CRC Optional Protocol on the Sale of Children as well as the obligations arising for State Parties to CEDAW require consideration and application to ensure that concrete measures are in place to provide the protections set out therein in the particular context of surrogacy.

If these concerns are accepted, there are indisputable problems that must be acknowledged in order to ensure that the consent of the surrogate (and her husband or partner on the basis that they are treated as legal parents of the child) to the surrogacy is valid and fully informed. The guiding principle is of informed and continuing consent. It has been questioned whether informed consent is a universal standard; it has been suggested that it is, instead, something that must or should aspire to take account of cultural, regional, or national differences, perhaps even within a state. While the uncertainty is not confined

⁵⁶¹ Due diligence should be understood as an obligation of States Parties to the Conventions to prevent violence or violations of human rights, protect victims and witnesses from human rights violations, the obligation to investigate and punish those responsible, including private actors, and the obligation to provide access to redress for human rights violations. *E.g.* CEDAW GR No. 19 (1992), para. 9, CRC GC No. 13 (2011), para. 5; CEDAW GR No. 28 (2011) para. 13; CEDAW GR No. 30, para. 15; CEDAW Committee's views and decisions on individual communications and inquiries.

to inter-country surrogacy,⁵⁶² the absence of agreed international standards and the market surrounding surrogacy reinforces the necessity of relying upon domestic mechanisms of the state of birth and receiving states (the home state of the intending parents) to ensure that the consent of the surrogate is valid and informed. The study of India in Chapter Three points out that providing an adequate legal and judicial infrastructure is a necessary first step towards providing domestic mechanisms that assure the autonomy and dignity of the surrogate as well as the rights of the child.⁵⁶³ This means that states of birth cannot rely on receiving states to routinely scrutinise consent. Equally, the receiving states must also act to ensure that the consent of the surrogate is valid and informed consent. The UK provides an example of post-birth assessment.

Understanding the factors that might impede the provision of informed consent in the context of surrogacy, and more importantly, identifying the factors that encourage provision of that consent is critical. It is not sufficient simply to put a law on the books that requires valid, voluntary, and informed consent. The cultural factors that might impinge upon this in each state of birth must be accounted for within the processes and means for obtaining consent. The domestic elements that determine whether adequately informed consent is provided in inter-country surrogacy also form part of the holistic determination as to whether other rights of these children receive recognition and protection.

The timing and the method of recording of this consent also requires consideration. This is an area which has been slow to develop in those states that do not have a framework for surrogacy. While excessive delays in obtaining consent can prejudice the development of the child, especially if he or she is separated from the intending parents and placed in state care, a careful balance must be struck. Given the nature of inter-country surrogacy arrangements, it is unlikely that a surrogate will be available to give her consent and evidence in person in the home state of the intending parents and it is therefore necessary to ensure that appropriate measures are in place to ensure that the surrogate's consent to the surrogacy arrangement is properly documented. A gender-sensitive approach is recommended. At the same time, it is important that the privacy of surrogates (and their families) is respected throughout and following the surrogacy process, including confidentiality of medical and other personal information.

Thinking more broadly, the potential practices of cell trafficking, particularly ova sale, raise human rights issues and may amount to violations of international agreements on health and medical standards. Beyond the basic right of every individual to human dignity

562 In the context of inter-country adoption, see the work of D. Smolin, e.g. 'The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals' [2005] *Seton Hall Law Review* 403, 489. See also the work of C. Fenton-Glynn, in particular *Children's Rights in Intercountry Adoption: A European Perspective* (Intersentia, 2014), Chapters 4, 5 and 6.

563 As discussed in 4.10 in the context of inter-country adoption, under the Hague Adoption Convention, this duty is assigned to sending states.

are the prohibition of trafficking in ova and gametes and the right to an adequate standard of health. To the extent that modern techniques of human reproduction or genetic engineering amount to inhuman treatment of any person involved, states seem to be under an obligation to protect this inherent dignity. The same applies if these techniques would endanger the right to life (Articles 2 ECHR and 6 ICCPR) or would amount, as possibly in the case of exploitative surrogacy arrangements, to a slavery-like practice as prohibited in Articles 4(1) ECHR and 8(1) ICCPR. The UN Special Rapporteur on Trafficking in Persons could draw greater attention to the problem areas in order to cultivate further debate on this issue and promote state-oriented solutions.

4.15.3 *The child's best interests*

At a domestic level, states are responsible for implementing agreed national and international principles and standards, and, if possible, raising them. It is, however, appropriate to observe that the line between the principles and standards of international law and the application of domestic law is more blurred in relation to children than in other areas. It is all very well for a national authority or court with jurisdiction to be obliged to start from the premise that the primary concern is to make orders which are in the best interests of the child, but this is easier said than done, because the best interests of the child today may not necessarily be the same as they would have been, say, six or twelve months ago. There are certainly cases (e.g. *Keegan v. Ireland*; *Paradiso*) in which this reality may produce reasoning which is rather difficult. The comparative review in Chapter Three also offers examples.

The best interests of the child standard has been cited throughout this chapter:⁵⁶⁴ when decisions or actions must be taken that concern children, their best interests should be a primary consideration. This means that the best interests of the child do not have to be decisive, but have to be at least considered first. In all decisions and actions, it should first be considered what course of action is in the best interests of the child. Only thereafter can the interests of the parents and other considerations be taken into account. The term should not be used as an abstract concept but as a process of decision-making which should be practical and responsive to the changing interests of the children.

A court must view all matters relating to a child, irrespective of the means of reproduction, through a wider lens, with emphasis on the best interests of the child, including the legal and constitutional rights of the child, at the time of the court proceedings, and the child's well-being going forward. It has been seen the best interests as a term is inseparable from well-being and includes all that is relevant to a child's development as a person. This

⁵⁶⁴ This notion can be found in all international instruments either directly in the provisions or indirectly in explanatory reports and in the case law referenced in Chapter Three.

inquiry is fact specific and must account for the circumstances of each case but also factors in broader familial and public policy considerations. It would seem that the emphasis is on a holistic evaluation taking a medium and long-term view. This point is crucial. The judicial task is to evaluate all the options, undertaking a global, multi-faceted evaluation of the child's welfare which takes into account the negatives and the positives of each option.

It may seem difficult to consider the rights of children who have not yet been conceived. The discussion therefore raises an issue of whether states must assess the capacity of intending parents to satisfy these obligations and whether that assessment should precede the establishment of legal parentage.⁵⁶⁵ International law requires parents to care for their children and states to take measures to ensure parents are able to satisfy this obligation. International law further requires states to protect all children from violence, abuse, or neglect. This is true for all parents, whatever their sexual orientation and wherever they are resident. The risks might arise if, for example, either parent (or any intermediary) had prior convictions for sexual or physical offences. In the context of surrogacy, such concerns in this emerging area could be identified by, for example, the requirement of criminal record and safeguarding checks, which, although contentious, is less onerous and more proportionate than the prospect of a parental suitability assessment.

4.15.4 *A child's right to be heard and to express views*

In addition to the standard of the best interests of the child, the child has the right to express his or her views and, in the case of proceedings concerning the child, he or she has the right to be heard.⁵⁶⁶ There is a condition, however, only children who are considered to be sufficiently mature enjoy these rights.⁵⁶⁷ No minimum age is set to enjoy these rights; instead the maturity of the child is decided on the basis of the facts of the case and the child in question. This gives the national legislator and the national competent authority a margin to apply the provisions. However, the aim is to ensure that, in any such proceedings, all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. Thinking then, in the context of surrogacy, while children born of surrogacy may often be too young (often

⁵⁶⁵ As discussed, such an assessment is fundamental in the context of adoption and a determination of suitability to parent is a prerequisite for a lawful inter-country adoption under the Hague Adoption Convention.

⁵⁶⁶ All of the discussed instruments except for the very general instruments – the ICCPR and the ECHR – contain one or more specific provisions on the child's right to express his or her views or the child's right to be heard. Article 3 European Convention on the Exercise of Children's Rights provides an express right in this context.

⁵⁶⁷ See, e.g. Articles 4 and 6 of the Convention on Contact.

babies) to articulate their views when a state considers the effects of a surrogacy arrangement, nevertheless their views and interests should be represented. One means is by appointing a special representative or court appointed guardian for the child to make necessary and proportionate enquiries. But what if the child is of sufficient maturity? It should be noted that in the decisions of *Mennesson* and *Labassee*, the children were aged 12 at the moment of the Strasbourg Court's assessment and due weight should be given, via the national authority, to that child's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.

4.15.5 *A child's right to information about his or her origins*

Over and above the issue of birth registration, a related issue is to what extent should details concerning the gestation and genetics be registered or recorded. Advances in modern assisted reproductive medicine and practices such as surrogacy, anonymous birth, and so-called baby boxes pose a challenge for states in determining policies on right of the child to information about their origins. The balance between this right and the right to privacy of donors – where donor ova and/or gametes are used – in addition to the rights of the surrogate mother, poses considerable difficulties that have not yet been adequately resolved.

Although the scope of the right to information on genetic origins includes, in some European states, identifying information about a donor, the right to such information is not absolute. As discussed, the CRC limits the right by providing that a child has the right to know his or her parents '*as far as possible*'. In turn, the ECHR right to privacy (as interpreted by the ECtHR) may be restricted, or limited, where it conflicts with the protection of the rights of others. Accordingly, an unconditional right to identifying information does not exist. Freeman has argued that the right to identity '*is a right not to be deceived about one's true origins*'.⁵⁶⁸ Thus, even if a gestational mother has no genetic connection to the child she is carrying, knowledge of her identity remains important and is likely to be relevant to the child's sense of his or her origins and sense of self.⁵⁶⁹ Tobin argues that to find otherwise would be to marginalise the surrogate's significant role in bringing the child into being, which is a vital element of the child's identity.⁵⁷⁰ On the basis of this reasoning, if surrogate-born children have a right to information about the surrogate and

568 M. Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' [1996] 4 International Journal of Children's Rights 273, 291.

569 J. Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' [2002] 10 Medical Law Review 271 (stressing the importance of a child having knowledge of his or her mode of conception and surrogate mother).

570 J. Tobin, 'To prohibit or permit: What is the (Human) Rights response to the practice of International commercial surrogacy?' [2014] 63(2) International and Comparative Law Quarterly 317, 329.

gamete providers under Article 7 CRC, recording and preserving identifying information in accordance with Article 8 CRC could be interpreted as necessary since the existence of such information is a prerequisite for surrogate-born children to be able to trace their biological or genetic origins.⁵⁷¹ For European states, Article 8 ECHR imposes a positive obligation to disclose specific information to individuals in specific circumstances. This positive obligation is said to be inherent in effective respect for private and family life and, where engaged, it requires the establishment of effective and accessible disclosure provisions.

On the basis that the best interests of any future child must be considered prior to surrogacy arrangements and other forms of ART, it must be asked whether this is a legitimate aim that justifies a restriction in these practices. Yet there is a way to accept parenthood through surrogacy, and, more broadly assisted reproduction, while at the same time protecting the welfare of the future child to ensure that relevant information is retained.

The right to privacy is also important for the surrogate-born child to determine when circumstances surrounding their conception are disclosed to others, for example, whether the circumstances of their birth and/or their genetic history is only available to them or to others via their birth certificate. Balancing the potential conflict between the rights of the child and the rights of those persons involved in the surrogacy process (including donors) who wish to remain anonymous, it is submitted that states must put in place regulatory structures which ensure appropriate record-keeping and mechanisms to enable children to access information regarding those individuals who played a genetic or gestational role in their creation. At a minimum, it would not be unreasonable to insist that any organisation seeking to facilitate surrogacy arrangements also maintain records of the individuals involved. This information might then be provided to the child at an appropriate time.

This trend towards greater openness should be recognised as relevant to the child's best interests in formulation of policies related to surrogacy. All of these factors, in addition to medical concerns, point to a need for national authorities to maintain registries to enable the furtherance and protection of a surrogate-born child's right to have access to information relating to his or her origins. The furtherance of this right, however, is somewhat hampered as long as states of birth do not record data of the surrogate and gamete providers. As has been discussed, for example, in India, the surrogate mothers' and egg providers' names do not currently appear anywhere in the birth or hospital records of these children. The resulting conclusion is that the risks of harm, primarily to the child to be born but also to the adults involved in surrogacy arrangements, justify a degree of regulation of surrogacy arrangements.

⁵⁷¹ This should be considered in the context of donors.

4.15.6 *A child's right to registration at birth*

There is a clear obligation placed on States Parties in multiple international human rights instruments to register children at or immediately after birth. In most states, it is an offence knowingly to make false or misleading representations to the authorities in an application or notification for birth registration. There is considerable diversity in the timeframes within which a birth must be registered as well as who is responsible for registering the birth (e.g. the hospital or the parent(s)). The details recorded in the child's birth record may also be very different across states.⁵⁷² In most (if not all) states, once persons are registered as the parents of a child in the child's birth record, those persons are considered as the legal parents of the child for all purposes, unless and until the record is contested. Guidelines should clarify and build upon the suggestions made by – among others – the Committee on the Rights of the Child in its response to individual State Party reports but also take into account the recommendations of organisations such as UNICEF that have been undertaking numerous activities to promote universal birth registration for all children, including those born by way of surrogacy. Thus, the guidelines should provide for the compulsory and accurate registration of all births, the recording of the identity of the surrogate, gamete providers and the intending parents, awareness raising on the importance of birth registration among all relevant actors, and the facilitation of late birth registration. It would be beneficial to elaborate guidelines on appropriate procedures, including suitable measures with a view to tackling statelessness within this context.⁵⁷³

The Committee on the Rights of the Child could draft a General Comment to Article 7 CRC. Alternatively, the task could be taken on by the Human Rights Committee as a General Comment to Article 24 ICCPR. As opposed to the amendment to existing treaties or the drafting of a specialised convention, these options have the advantage of both speed and simplicity. It would also be a way of avoiding any critique surrounding the over-proliferation and fragmentation of human rights documents. After all, the right of a child to be registered at birth is already clearly delineated in binding instruments; all that remains is to clarify how this right should be implemented in the context of surrogacy. Yet the weakness of such an approach is evidenced in the title of the document produced: it would be a General Comment or Recommendation and lack full binding authority. Alternatively, all of the above issues could be dealt with jointly in a new UN (or regional) convention on civil registration procedures or indeed a protocol to the 1961 Convention on the Reduction of Statelessness (discussed further in Chapter Five).

⁵⁷² See a study for the Legal Affairs Committee of the European Parliament, 'Life in Cross-Border situations in the EU (a comparative study on civil status)' (available at: <www.europarl.europa.eu/studies>).

⁵⁷³ See Chapter Five.

4.15.7 *A right to continuity of a personal status*

A key finding from the analysis in Chapter Three is that there are very real concerns of 'limping' legal relationships and that the continuity of a personal status for children's well-being should not be ignored. Baratta comments that the unity, stability, and continuity of an individual's personal status is of a social interest.⁵⁷⁴ A certain civil status is a constituent element of a child's personal identity.

Children left with 'limping' legal parentage and, of course, children left stateless⁵⁷⁵ are at risk of suffering serious legal disadvantages throughout their lives due to the myriad of legal consequences which flow from a determination of legal parentage in most states. Indeed, the exercise of children's fundamental rights may be impeded in this situation and they may be in a position in which they are, in effect, discriminated against because of the circumstances of their birth (contrary to multiple international human rights treaties).

The continuity of a person's legal status appears not to be self-evident. While the legal recognition of an child's personal status belongs to the assessment of the best interests of the child and the sphere of private and family life that is protected by Articles 8 and 16 CRC and, in the European context, *inter alia*, Article 8 ECHR or Article 7 EU Charter, there is no obligation to recognise a (change in) personal status acquired abroad. Instead, European and international human rights law place an obligation on states to balance public and private interests proportionately. According to Baratta, recognition of the legal status as established by foreign judgments satisfies the primary interests of individuals as to certainty about, as well as to stability of, their personal and family legal relationships. Instruments dealing with recognition offer a flexible solution for meeting the social need of individuals with regard to the indivisibility of their personal status.⁵⁷⁶ This leads to a number of conclusions. First, the immutability of civil status, whether it constitutes an element of or requisite for the right of the surrogate-born child, is not something to be taken lightly. Second, in addition to the lack of legal certainty and the likely interference with the child's legitimate expectations, the discontinuity of personal status has other and very significant legal and social consequences for the child, his/her intending parents, and the state. As Baratta defends, the primary justification for recognition can no longer only be found in the international harmony of decisions but also in the fact that recognition tends to realise and protect the fundamental rights of persons.⁵⁷⁷

Applying these tenets, it is submitted that by invoking a public policy reservation leading to the non-recognition of the filiation with the intending parents could amount

⁵⁷⁴ See R. Barrata, 'La reconnaissance internationale des situations juridiques personnelles et familiales', Collected Courses of the Hague Academy of International Law (Martinus Nijhoff Publishers, 2011), 272.

⁵⁷⁵ See Chapter Five.

⁵⁷⁶ *Ibid.*, 272.

⁵⁷⁷ *Ibid.*

to discrimination of this category of children, thereby violating Article 2 CRC and amount to a breach of a state's obligations respecting the child's rights to an identity and to private and family life arising from Articles 8 and 16 CRC and, for European states, Article 8 ECHR. It may also, as suggested above, run contrary to the child's best interests. The harm that results is more than just material burdens.

As discussed in the context of the European Union, the discontinuance of a personal status appears also to restrict the freedom of movement of persons enshrined, for example, in Article 21 TFEU and Article 45 EU Charter. The analysis reveals that in an individual case, disparate treatment as result of a conflict between two differing national EU legal systems can result in discrimination (*Garcia Avello*) or a restriction of the right to move and reside freely within the territory of the Member States (*Grunkin and Paul*, *Sayn-Wittgenstein*, *Runevic-Vardyn and Wardyn*). At the same time, it would be incomplete to conclude without noting that not all disparity in treatment of EU citizens, as result of differing legal systems, is a disproportionate restriction of the right to move and reside freely pursuant to Article 21 TFEU. It therefore appears at this moment of the CJEU's consideration that a non-recognition of a civil status that causes a serious inconvenience and that cannot be justified on the basis of objective considerations (e.g. by invoking the public policy justification which is proportionate to the legitimate aim pursued by the national provisions) may fall foul of EU treaty protections.⁵⁷⁸

4.15.8 *A child's right to parents or a parent's right to a child?*

It appears that current European and international human rights law provides no human 'right to a child';⁵⁷⁹ this is the position even for those who can only have a genetically related child with the help of a surrogate. Once a child has been born, however, assuming the child is not the result of a coerced pregnancy or a similarly egregious violation of human rights, international human rights law supports the right of that child to parents (considered broadly) to raise that child. If it is accepted that all children have a right to parents and that it is in the best interests of children to have parents already at birth, it is illogical to have a parent – who may be acting as the main carer – prevented from accepting legal responsibility for a child when he or she is willing to do so, and it is unlikely not to be in

⁵⁷⁸ See the discussion at 4.14.3.

⁵⁷⁹ On this issue, see D. Cutas and L. Bortolotti, 'Natural Versus Assisted Reproduction: In Search of fairness' [2010] 4(1) *Studies in Ethics, Law, and Technology*, 14. Cutas and Bortolotti distinguish between the right to reproduce and the right to parent in their comparison of natural and assisted reproduction. They also distinguish cases of parenthood following social intervention, *i.e.* via adoption, custody and foster care, where decisions must be based on the child's best interests, from cases of prospective parenthood following medically assisted reproduction, where no children exist before a decision is made to permit or deny access. In the former situation, parenting is assisted but not reproduction. In the latter, both reproduction and parenting are assisted.

the child's best interests. Denying a child a legal relationship with his or her parent may violate that child's right to identity (Articles 7 and 8 CRC; Article 8 ECHR) and right to respect for his or her family life (Articles 8 and 16 CRC; Article 8 ECHR). There is no doubt in many of the reported cases that as far as those children are concerned their identity has already been formed as the genetic children of their father and the commissioning of their conception and birth involving their mother.

Denying a legal relationship may also violate the obligation to support and promote the common responsibilities of parents in raising a child (Article 18 CRC). Some mothers and co-parents and their children are likely to be worse off as a result. In other words, establishing legal parenthood should be seen as a way of protecting the interests of a child – a right of the child.⁵⁸⁰ Importantly, the sexual orientation of the parents is not a relevant factor under international law when determining the limits of who can found a family.⁵⁸¹

It follows that a key objective of this thesis has been to find a way to secure parents for the surrogate-born child. It has been discussed that the international law source of the child's right to parents is derived, *inter alia*, from Article 7 CRC and Article 8 ECHR. The child's right under Article 7 CRC to know and be cared for by his or her parents presupposes that it is possible to establish who the child's parents.⁵⁸² This right is further supported by the right to respect for private and family life (more specifically a right to identity) found in the CRC, Article 8 ECHR and the EU Charter. In addition, a number of other international instruments⁵⁸³ contain similar or mirror articles to those found in the CRC and the ECHR. These further reinforce the child's right to parents and a state's obligation to ensure that this right is guaranteed also for children born following surrogacy arrangements. It has also been discussed that there is no definition of such terms as 'parent', 'identity', or 'family relations'. This is unproblematic in the context of a child conceived without ART by two heterosexual partners. In such circumstances, the ordinary meaning of 'parents' reflects the two individuals with a direct genetic, gestational, and social nexus with a child. Modern reproductive technology, however, allows for the involvement of multiple persons in a decision to create and care for a child. The term 'parent' is used in the CRC without

580 See B. Stark, 'Transnational Surrogacy and International Human Rights Law' [2012] 18(2) ILSA Journal of International and Comparative Law; A. Singer, 'The Right of a Child to Parents' in K. Boele-Woelki, N. Dethloff and W. Gephart (eds.) *Family Law and Culture in Europe - Developments, Challenges and Opportunities* (Intersentia 2014), 137-148.

581 For a more detailed discussion of this issue, see J. Tobin and R. McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 International Journal of Law Policy and the Family 110.

582 For a discussion on the child's right to parents, see A. Singer, 'The Right of a Child to Parents' in K. Boele-Woelki, N. Dethloff and W. Gephart (eds.) *Family Law and Culture in Europe - Developments, Challenges and Opportunities* (Intersentia 2014), 137-148.

583 E.g. the African Charter on the Rights and Welfare of the Child and the Covenant on the Rights of the Child in Islam.

any indication as to whether the term refers to the child's genetic, social, or legal parents and, in this respect, simply begs the question as to how states should determine 'parentage' for these purposes. In the context of a surrogacy arrangement, a minimum of three persons (the surrogate and the intending parents if their genetic material is used to create the embryo) and potentially five (the surrogate mother, genetic or social mother, genetic father and two intending parents) may each have a distinct role. Should all of these persons be recognised as parents? Such an approach challenges the dualist and hetero-normative conception of parenthood that dominates most legal systems. But is such an approach required by international human rights law? Although the Committee on the Rights of the Child has not addressed this issue specifically, it has acknowledged that international law accommodates and recognises diverse family formations. This opens up the possibility for recognition of more than two parents or holders of parental responsibility and that they need not be in a heterosexual union.

The ambiguity in the definition of 'parent' cannot detract from the fact that, in a cross-border context, if a child has uncertain or 'limping' parentage (as a result of two states answering the question 'who is / are your parent(s)?' in a different manner), this will likely seriously compromise the child's ability to enjoy many of these rights (aside from the fact that the situation, in itself, is likely to breach Articles 7 and 8 CRC). In fact, it may, in turn, breach another of the child's fundamental rights, not only found in the CRC but in the international and regional human rights treaties discussed above: that is, the child's right not to be discriminated against simply because of the complexities and challenges surrounding the child's birth and status.

In those cases where the law does not allow parentage to be established or recognised between an intending parent and a child, states must, having assessed the child's best interests in the circumstances of the family unit, permit the exercise of some parental responsibilities by that person upon decision of a competent authority.⁵⁸⁴ With the increasing accessibility of ART and surrogacy, if society is to take children's rights seriously, it must include deliberations on the future of the resulting children and at least a discussion on the responsibility of society for these children and these families.

It must follow that Contracting States to the ECHR and States Parties to the CRC have an obligation to ensure that the rights of the child are protected. The child's status should not be uncertain following surrogacy arrangements any more than it should be following a natural birth or a MAR procedure.

The true and full protection of children requires their enjoyment of all rights in practice, that all children are protected from discrimination and enjoy equal opportunities in order

⁵⁸⁴ A possible regulation of parental responsibilities for persons other than legal parents can also be found in the Model Family Code. I. Schwenzer, *Model Family Code - From a Global Perspective* (Intersentia 2006), 143-144. See also K. Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007).

to allow them to develop their full potential. Excluding and repressing chosen bonds in order to enforce specified and limited family structures would seem to be counter-productive to a constantly evolving society. It cannot be in the best interests of surrogate-born children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests, simply on the basis of their birth status. Prioritising the rights of these children does not mean that other objectives or approaches are to be considered unimportant or invalid.⁵⁸⁵ For example, states remain entitled to develop strong civil and criminal justice responses to protect each of the parties to the surrogacy arrangements. The question of the rights of children raised in these families and the very real human relationships that exist should form part of the wider dialogue about children raised in relationships based on love and care. That being so, it is worth remembering in the context of Europe that while as a matter of judicial comity,⁵⁸⁶ it is for the European domestic courts to comply with Strasbourg case law as a minimum requirement, no principle requires the Strasbourg Court to define the ceiling of the ECHR rights.

Certainty in parentage, civil status and birth registration are vital to the welfare of a child born as a result of a surrogacy arrangement, and the difficulties that have arisen in so many high-profile cases detailed in Chapter Three emphasise the need for consistency in approach and the need for domestic and international regulation.

585 Nor does it mean that a bespoke international treaty responding to surrogacy is necessarily required but it does suggest that the special circumstances surrounding the birth of these children do require specific consideration.

586 Comity is a doctrine holding that states should defer and give effect, for example, to the judgments of other states.

5 THE RIGHT TO A NATIONALITY AND THE PREVENTION OF STATELESSNESS

5.1 INTRODUCTORY REMARKS

The starting point for this chapter is the child's right to a nationality at birth. This implies that the child has a right not to be born stateless. As established in Article 15(1) of the Universal Declaration of Human Rights (UDHR) everyone has the right to acquire a nationality. In Chapter Four, it was considered that, according to Article 7(1) CRC, the child shall be registered as soon as he or she is born and from this point on has a right to a name and, to the extent possible, the right to find out who are his or her parents and to be raised by them without discrimination. In particular, it follows from an analysis of the CRC and the best interests principle that a child must not be left stateless for an extended period of time and, therefore, must acquire nationality at birth or as soon as possible after birth.¹ Despite these obligations, it has been noted throughout this thesis that, depending on the state in which the child is born and the nationality laws applicable to the circumstances, surrogate-born children are at risk of being born stateless.²

This chapter considers the parameters of international law with respect to the right to a nationality and the prevention of statelessness as applicable in the context of (inter-country) surrogacy.³ This chapter also examines any efforts which have been undertaken at a bilateral, regional, or international level, either towards international cooperation in this area and towards human rights standards promoting a universal right to a nationality. This will provide a basis for recommending improvements, whether this involves the further promotion, implementation, and supervision of the existing relevant international instruments or the use of alternative or creation of new instruments or other legislative measures.

1 UN High Commissioner for Refugees, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (21 December 2012) HCR/GS/12/04 *available at*: <www.refworld.org/docid/50d460c72.html>.

2 As discussed in 5.4, Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons establishes the customary international law definition of a stateless person as a person 'who is not considered as a national by any State under the operation of its law'.

3 A table summarising the varying domestic approaches to surrogacy and the law of nationality is set out at 3.12 in Chapter Three.

5.2 THE ATTRIBUTION OF CITIZENSHIP⁴

The topic of surrogacy in the context of citizenship⁵ has received judicial, national, and academic attention often leading, as considered in Chapter Three, to the conclusion that the child born by way of inter-country surrogacy is likely to be stateless. The key questions emerging from the national reviews in Chapter Three are: Can and should the child acquire the citizenship of his or her intending parent(s)? Can and should the child acquire the citizenship of the state in which he or she was born? How, if at all, is the child's statelessness prevented and what obligations or universal international standards are states subject to when considering the citizenship and status of a child born by means of a surrogacy arrangement?

It must be noted that the debate around citizenship and nationality is not facilitated as there is a lack of clear agreement as to how to understand either term.⁶ Although citizenship is often talked about as a singular concept, in practice the term encompasses a number of discrete but similar phenomena surrounding the relationship between the individual and the state.⁷ In the *Nottebohm*⁸ case, the International Court of Justice described nationality as '*a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*'. On this reading, nationality is the link between the individual and the state.⁹ There are many different factors that may serve as evidence of this '*social fact of attachment*' for the purposes of nationality attribution. Among them: place of birth, descent, residence, family ties, language and ethnicity.

What is clear is that a child without a nationality would not have a formal link to a nation state – and, possibly, no registered name at birth or birth record – and would have restricted or even no civil rights or benefit from diplomatic protection.¹⁰ As long as a child is without a nationality, that child's basic human rights remain at risk of violation.¹¹ The child's rights to reside could be severely curtailed as these would be at the discretion of the

4 The discussion here is based, in part, on M. Wells-Greco, 'Surrogacy, Parenthood and Nationality: Much Ado about Everything' in S. Rutten and K. Saarloos (eds.) *Van Afstamming tot Nationaliteit* (Kluwer, 2013).

5 The status of citizen is often also referred to as 'nationality', particularly in international legal documents, and whenever citing directly from such documents, or from national laws, citations are as used in the original document.

6 F. Medjouba and J. Stefanelli, *The Rights and Responsibilities of Citizenship* (British Institute of International and Comparative Law: 2008). The two terms are used interchangeably in this thesis.

7 K. Rubenstein and D. Adler, 'International Citizenship: the Future of Nationality in a Globalized World' [2000] 7 *Indiana Journal of Global Legal Studies* 519.

8 *Nottebohm* case, (second phase), Judgment of 6 April 1955: ICJ Reports, at 23.

9 J. Shaw, 'The Interpretation of European Union Citizenship' [1998] 61(3) *Modern Law Review* 293-317.

10 It is a long-standing doctrine of diplomatic protection such that states may only exercise it with respect to their nationals. See I. Brownlie, *Principles of Public International Law* (Oxford University Press 2003), 459-460.

11 J. Milbrandt, 'Stateless' [2011] 20 *Cardozo Journal of International and Comparative Law* 75, 92.

host state. Domestically, stateless persons may be denied access, for example, to education and health care. Such children would not be entitled to a passport or international travel document, making it difficult for them to travel outside the state where they reside and obtain travel visas.¹² And although nationality is no longer a prerequisite for the attribution of most human rights, in practice it is often still a requirement for the practical exercise of such rights, for example, due to problems in relation to documentation and the lack of any official 'home country' in which rights are guaranteed and respected.

The matter of citizenship is a complex one and often politically sensitive. In principle, the rules on citizenship fall within the scope of domestic jurisdiction and therefore within the domain of national law. Traditionally, the concept of citizenship is inextricably intertwined with issues of state sovereignty.¹³ States have no obligation to confer citizenship, and it is within a sovereign state's discretion to dictate the terms of eligibility for citizenship, a principle that has been repeatedly recognised by international and regional instruments, and judicial bodies.

As has been observed in the comparative reviews in Chapter Three, the problem of a stateless surrogate-born child may be attributed in part to the variant principles that govern the acquisition of nationality in different states and in part to the law of parentage. In general, states adhere to doctrines based closely on one or more of the following principles: *jus soli*, *jus sanguinis*, and *jus domicilli*.¹⁴ The acquisition of nationality at birth operates under two of these principles: *jus soli* (right of the soil) and *jus sanguinis* (right of blood or descent).¹⁵ States operating under the *jus soli* principle confer nationality to those who are born within their territory, while states who have adopted the *jus sanguinis* principle grant nationality based upon the nationality of the child's parent(s) or ancestors. The two doctrines are not mutually exclusive, and a given state's nationality laws may operate under both principles.¹⁶

12 For an overview of the topic of statelessness and nationality, see T. Lin, 'Born Lost: Stateless Children in International Surrogacy Arrangements' [2013] 21 *Cardozo Journal of International and Comparative Law* 545. German philosopher and political theorist Hannah Arendt viewed statelessness as lacking the very 'right to have rights', H. Arendt, *The Origins of Totalitarianism* quoted in M. Gibney, 'Statelessness and the Right to Citizenship' [2009] 32 *Forced Migration Review*, 50.

13 J. Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law' [1998] 19 *Michigan Journal of International Law* 1141, 1151.

14 It is also possible to acquire a (different) nationality later in life, in recognition of a more recently established genuine link with a state. The principle of *jus domicilli* or the law of residence is the most common ground for naturalisation where the nationality of the state is granted upon application to the competent authorities. This topic is beyond the scope of this thesis.

15 P. Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws' in *Citizenship Today: Global Perspectives and Practices* in T. Alexander Aleinikoff and D. Klusmeyer (eds.) (Brookings Institution Press 2001), 17.

16 For a careful assessment of the recent trends in the context of citizenship, see M. Vink and G. de Groot, 'Birthright Citizenship: Trends and Regulations in Europe' November 2010 EUDO Citizenship Observatory. The main causes of statelessness have been linked to problems caused by state succession, discrimination, and arbitrary denial or deprivation of nationality as well as technical causes. The latter would seem to include

If a couple (or an individual) engage(s) a surrogate in a state operating under *jus soli* principles, such as the USA, the child born would be a US person at birth.¹⁷ By contrast, a couple who has engaged a surrogate in a state operating under *jus sanguinis* principles (such as in the Ukraine or India) may find that the child is not recognised as a citizen of any nation.¹⁸ Acquiring nationality in a state with *jus sanguinis* principles requires establishing legal parentage, a difficult task when two states adopt disparate positions on the application of the law of parenthood in the context of surrogacy. Special 'descent' citizenship problems may also arise if a third person (e.g. a surrogate) is involved in the birth of the child. In these cases, due to a possible controversy about the determination of who is the legal mother or father at birth, the child is at risk of being stateless if the state of the surrogate's or the legal (birth) father's citizenship does not attribute citizenship to the child and the state of the intending mother or father does not attribute citizenship either. This means that the relevant national authority will need to answer the question of legal parentage in order to subsequently determine whether the child can be granted a passport or other travel document. As discussed in Chapter Three, in many states, the child's legal parentage will be determined by an application of the state's PIL rules (that is, their applicable law and/or recognition rules, depending upon the state concerned), rather than simply by reference to that internal law. However, there are differences in the PIL rules in this area, and this necessarily affects the national approach adopted. Moreover, exactly which rules of the state will apply to a particular case will depend upon the procedure used to establish legal parentage in the state of birth and thus the document(s) with which the home state of the intending parents are presented (that is recognition or choice of law method), and, as discussed in the context of the research states (Chapter Three), this is not always clear.

Where the child cannot acquire nationality by descent, and the child is unable to enter the territory of the home state of the intending parents, some states provide a degree of flexibility with their immigration rules to enable the child to enter the state in order to regularise the position once the child is 'home' (this seems to apply after varying degrees of safeguard checks e.g. confirmation of a genetic relationship). In this regard, in some states, these intending parents are able to apply for a visa for the child or for 'entry clearance' to enable the child to enter the state outside the normative immigration rules.¹⁹

These comments have implications for inter-country surrogacy arrangements. The existence of different doctrines for the attribution of nationality and the usual requirement of secondary components and connecting factors such as habitual residence in that state

cases where there are conflicts between the nationality laws of different states or between other administrative or legal measures that may impact on the application of nationality laws.

17 U.S. Constitution, Amendment XIV, § 1, cl. 1 ('All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside').

18 See, for example, the reports on India and the UK in Chapter Three.

19 See, for example, the reports on the UK, Belgium, and France in Chapter Three.

- combined with the competence of states to regulate the conferral and withdrawal of their nationality - leaves the door ajar to statelessness. The realities of cross-border reproductive care, and inter-country surrogacy more specifically, place additional pressure on the compatibility of these divergent yet coexisting doctrines. Since intending parents often cross borders and look to bare children in a state in which they are usually not themselves a citizen, if states do not communicate or cooperate on nationality matters, then conflicts between their individual policies may leave some children entirely overlooked and without the nationality of any state. Clearly then, there is a role for international law in preventing and resolving cases of statelessness – and so to the question of how international law treats the attribution of nationality.

5.3 DEFINING THE RIGHT TO A NATIONALITY

International instruments have repeatedly recognised an individual's right to a nationality.²⁰ Vink and de Groot observe that '[t]he fact that most, if not all, citizenship laws typically start with setting out the rules of attribution of citizenship at birth, and only later on in these documents specify rules concerning, for example, declaration and naturalisation procedures, and loss of citizenship, signifies a hierarchy of importance'.²¹ Birth right citizenship is the main allocation mechanism to ensure that everybody is a citizen of at least one state. In practice, this system is not without significant anomalies, as indicated by the phenomena of statelessness.²²

The right to a nationality has been the object of numerous studies, and attempted definitions, being one of the most recognised human rights by UN international instruments.²³ As mentioned above, Article 15 UDHR states that '(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his

20 See, for an extensive overview, G. R. de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge 2014).

21 M. Vink and G. R. de Groot, 'Birthright Citizenship: Trends and Regulations in Europe', November 2010, EUDO Citizenship Observatory.

22 *Ibid.*, 3.

23 Consider, for instance, Article 24 of the International Covenant on Civil and Political Rights; Article 7 of the Convention on the Rights of the Child; Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination; Article 18 of the Convention on the Rights of Persons with Disabilities; Article 6 of the African Charter on the Rights and Welfare of the Child; Article 20 of the American Convention on Human Rights; Article 7 of the Covenant on the Rights of the Child in Islam; and Article 6 of the UN Declaration on the Rights of Indigenous Peoples. See also, generally, the 1961 Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality, and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

nationality’.²⁴ The UDHR has served as the starting point for this development in international law.²⁵ The 1965 International Convention on the Elimination of All Forms of Racial Discrimination prohibits and eliminates in Article 5 racial discrimination in all its forms concerning nationality. Article 24 of the 1966 International Covenant on Civil and Political Rights (‘ICCPR’) provides: ‘*Every child shall be registered immediately after birth and shall have a name. Every child has the right to acquire a nationality*’. The interpretation of Article 24 by the Human Rights Committee (charged with monitoring the implementation of the ICCPR) as set out in General Comment No. 17 offers further substance to this right:

While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.²⁶

These two sentences offer further understanding of the substance of the obligation of the States Parties to the ICCPR. There exists a clear obligation on States Parties to adopt measures to prevent statelessness at birth, including mechanisms to prevent statelessness from arising from a conflict of *jus sanguinis* and *jus soli* doctrines. While the ICCPR does not prescribe universal adoption of the *jus soli* doctrine, the Human Rights Committee seems to suggest that States – if failing to secure another solution – may be obliged to grant nationality to a child born on the territory of the State if the child would ‘*otherwise be stateless*’. In the years since the adoption of this General Comment, the Human Rights Committee has clarified its views on the obligations of States still further in the Concluding Observations of a number of state reports.²⁷

A child’s right to a nationality has been further protected by Article 7 CRC:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality [...]. States Parties shall ensure the implementation of these rights in accordance with their national

24 Universal Declaration of Human Rights, United Nations General Assembly, Paris, 10 December 1948 (General Assembly resolution 217 A (III)).

25 The understanding of this ‘right’ is not without controversy. It has links also to the right to self-determination also listed in numerous treaties but not unequivocally recognised by states. The author thanks Iverna McGowan-Smyth for these comments.

26 General Comment No. 17: Rights of the Child (Art. 24), Geneva: 7 April 1989, para. 8.

27 E.g. Human Rights Committee, Concluding Observations: Colombia, A/52/40 vol.1, Geneva: 1997, para. 306.

law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

In practice, this means that children who would '*otherwise be stateless*' have a right to nationality in the state in which they are born or a right to the nationality of a parent. Before a child can benefit from special measures to ensure that he acquires a nationality at birth, the state must be satisfied that the child would '*otherwise be stateless*'. These circumstances can only be established through the determination of such facts as the nationality (or statelessness) of the parents and the content, interpretation, and application of all relevant citizenship regulations. The timeframe with respect to this assessment should not be underestimated.

In comparison to the American Convention on Human Rights,²⁸ the Arab Charter on Human Rights²⁹ and to the African Charter on the Rights and Welfare of the Child³⁰, the ECHR nor any of the Protocols list nationality as a distinct human right.³¹ This gap has to some extent been bridged over by the introduction of nationality as a human right as one of fundamental principles for the rules on nationality in Article 4 European Convention on Nationality ('ECN').³²

5.4 INTERNATIONAL INSTRUMENTS RELEVANT TO THE PREVENTION OF STATELESSNESS AND THE PRESERVATION OF A NATIONALITY

To date, no treaty expressly deals with the nationality position of a child born by way of surrogacy. No international instrument indicates to which nationality a child should be entitled. Moreover, the accepted right to a nationality is not self-executive. Nevertheless, as suggested above, steps have been taken to coordinate international and regional efforts

28 American Convention on Human Rights 'Pact of San Jose, Costa Rica', adopted on 22 November 1969 and entered into force on 18 July 1978.

29 Article 29, as quoted in Chapter Four at 4.3.4.

30 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. In Africa, the African Charter on the Rights and Welfare of the Child (ACRWC) states in Article 6.4 that 'States Parties [...] shall undertake to ensure that their Constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws'.

31 In *Genovese v. Malta*, discussed in Chapter Four at 4.11, the European Court of Human Rights found that a provision under the nationality legislation of Malta violated the right to family life (Article 8 ECHR) in conjunction with Article 14 ECHR, the principle of non-discrimination.

32 Convention on Nationality, CETS No. 166, Strasbourg, on 6 November 1997. See also the European Convention on Nationality (CETS No. 166 of 1997) and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (CETS No. 200 of 2006).

to eradicate statelessness.³³ These steps are relevant for surrogate-born children and a discussion of the key instruments follows.

5.4.1 CRC

As discussed in Chapter Four, Article 7 CRC guarantees that every child has the right to acquire a nationality, while Article 8 CRC ensures that every child has the right to preserve his or her identity, including nationality. Article 2 CRC is a general non-discrimination clause which applies to all substantive rights enshrined in the CRC, including Articles 7 and 8. Article 3 CRC also applies in conjunction with Articles 7 and 8 and requires that all actions concerning children, including in the area of nationality, must be undertaken with the best interests of the child as a primary consideration.

For Doek, Article 7 CRC is very clear: a child has not only the right to acquire a nationality but also the right to preserve that nationality.³⁴ Article 8 CRC contains the unique provision that the child has the right to preserve his or her identity which includes nationality, name, language, and family relationship. Article 7(1) CRC expressly grants rights to all children. The direct applicability of these rights is, however, limited by the fact that most of them depend closely on the existence and application of a national legislative framework. The legal framework defines the essential aspects of the scope of the right guaranteed by Article 7(1) CRC. Pausing there, and considering the compatibility with Article 7(1) CRC of a refusal to recognise the filiation in the context of surrogacy, the rights guaranteed by this provision primarily serve as a basis for an interpretative rule: resorting to the application of, for example, a public policy exception should not result in the child being deprived of the rights granted under Article 7(1) CRC.

When the child has acquired a nationality on account of the child's place of birth (e.g. in the USA), the requirements of Article 7(1) CRC are, on the face of it, respected even if the home state of the intending parents refuses to recognise the filiation with the intending parents and therefore to establish the acquisition of nationality by descent. The situation is presented, however, in a different light if the state in which the child is born does not

33 E.g. 1954 United Nations Convention relating to the Status of Stateless Persons as well as to the ongoing debate that would lead to the adoption of the 1961 United Nations Convention on the Reduction of Statelessness *available at*: <www.unhcr.se/fileadmin/user_upload/PDFdocuments/Legal/2011-ReducingStatelessness.pdf> ('although it has long been understood that statelessness should be avoided and that this goal can only be achieved through international cooperation, many States have yet to take action to ensure that everyone enjoys the right to a nationality'). These instruments are not the only source of international standards relating to statelessness. In particular, developments in the field of human rights law and the promulgation of a number of instruments that address specific (sub)topics relating to the problem of statelessness have contributed to an expanding set of relevant standards.

34 J. Doek, former Chairperson UN Committee on the Rights of the Child, 'Citizen Child: A Struggle for Recognition', keynote speech [2007] *available at*: <www.jaapedoek.nl/publications/keynote.php>.

treat the child as a national of that state on account of its parent-child relationship with the foreign intending (legal) parents. India offers an example of this approach. As for the national state of the intending parents, if it refuses to recognise the parent-child relationship and therefore the application of the law on nationality by descent, the child is often stateless.³⁵ Article 7(1) CRC therefore imposes the obligation to resolve this negative conflict with a view to protecting the best interests of the child, both on the national state of the intending parents and on that in which the surrogacy has taken place, if they are both States Parties to the CRC. Under Article 7(2) CRC, the States Parties should take any necessary measures to ensure that the right of the child to a nationality is respected, '*especially in the event, or failure thereof, that the child is deemed to be stateless*'. It follows from a joint reading of Articles 3 and 7 CRC that a child may not be left stateless for an extended period of time. The obligations imposed on States Parties by the CRC are not only directed to the country of birth of a child, but to all countries with which a child has a link, e.g. by parentage. However, a child cannot deduce from this provision any specific or express right to acquire the nationality of an intending parent (or of both intending parents).

As suggested above, the Article 7 CRC standard as it relates to surrogacy requires incorporation into national law. Stark observes that if '*that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation*'.³⁶ This problem can be remedied by domestic law review and reform or, as proposed in the pending Indian legislation on surrogacy,³⁷ by requiring that the intending parents establish, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship in the state where his or her intending parents live and that they will be legally recognised as that child's parents in that state.

A child has not only the right to acquire a nationality but also the right to preserve that nationality. Article 8(2) CRC requires that States Parties, in case the child is illegally deprived of, for example, her or his nationality, shall provide appropriate assistance and protection with a view to promptly re-establish her or his nationality.³⁸

While the Committee on the Rights of the Child is yet to issue a General Comment on Articles 7 and 8, the framework provided in General Comment No. 5 of the Committee on the Rights of the Child is a useful tool for outlining the general measures that should be taken to implement the CRC and improve respect for children's rights.³⁹ It should be

³⁵ See, for example, the discussion with respect to France in Chapter Three at 3.3.4.

³⁶ B. Stark, 'Transnational Surrogacy and International Human Rights Law' [2012] 18(2) ILSA Journal of International and Comparative Law.

³⁷ See the discussion in Chapter Three at 3.9.

³⁸ For more details on the recommendations made by the UN Committee in respect of the implementation of Article 7, see UN Committee on the Rights of the Child 2006.

³⁹ UN Committee on the Rights of the Child, 'General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child' (27 November 2003) UN Doc CRC/GC/2003/5.

noted that the Committee has confirmed, in its General Comment No. 14,⁴⁰ that decisions concerning nationality are within the scope of the actions referred to in Article 3 CRC and, in this respect, '*individual decisions [...] must be assessed and guided by the best interests of the child*'.⁴¹ It should also be noted that the Committee has considered the issue of nationality of children involved in inter-country adoption and has recognised the risk that adoption procedures may lead to statelessness. The Committee's approach to these cases is to encourage the acquisition of the nationality of the adoptive parents.⁴² No mention is made of the need to prevent the loss of the nationality of origin. The Hague Adoption Convention is, however, entirely silent on the question of the effect that such adoption has on the nationality at birth of the child.⁴³

While General Comments are not legally binding on States Parties, they provide authoritative guidance on the interpretation and application of the CRC.⁴⁴ It can be concluded that where authorities are considering the acquisition or loss of nationality of children, special attention needs to be given to the objective of Articles 7 and 8 CRC as well as preventing statelessness among children as set out in Articles 1 to 4 of the 1961 Convention on the Reduction of Statelessness (discussed below) and read in light of the principle of the best interests of the child of Article 3 CRC. It is never in the best interests of the child to be rendered stateless.

5.4.2 *Specific UN conventions on preventing statelessness*

Specific conventions on remedying statelessness were promulgated in 1954 and 1961: the Convention relating to the Status of Stateless Persons (hereinafter, the '1954 Convention')

40 General Comment No. 14, 'On the right of the child to have his or her best interests taken as a primary consideration (Art.3(1))', adopted by the Committee at its 62nd session (14 January to 1 February 2013).

41 *Ibid.*, para. 30.

42 This problem has been discussed in Committee on the Rights of the Child, Concluding Observations: Palau, CRC/C/103, Geneva: 2001, para. 458; Switzerland, CRC/C/118, Geneva: 2002, paras. 340-341; Canada, CRC/C/133, Geneva: 2003, paras. 76-77.

43 At a national and regional level, this has been addressed. With respect to the latter, the European Convention on Nationality prescribes facilitated access to nationality for children adopted by a national of the state and prohibiting loss of nationality in the adoption of a child if the child would thereby be rendered stateless. The ECN also incorporates what is considered to be the best interests of the child affected by inter-country adoption – access to the nationality of the adoptive parents, reflecting the link with the new state which is formed through adoption and helping to promote family unity. See the discussion on the Hague Adoption Convention in Chapter Four at 4.10.

44 Concluding Observations: Czech Republic, CRC/C/15/Add.201, Geneva: 18 March 2003, para. 38; Estonia, CRC/C/15/Add.196, Geneva: 17 March 2003, para. 29; Kazakhstan, CRC/C/15/Add.213, Geneva: 10 July 2003, para. 33; Romania, CRC/C/15/Add.199, Geneva: 18 March 2003, para. 33; Syrian Arab Republic, CRC/C/15/Add.212, Geneva: 10 July 2003, para. 33.

and the Convention on the Reduction of Statelessness (hereinafter, the ‘1961 Convention’).⁴⁵ There are 86 State Parties to the 1954 Convention,⁴⁶ and 63 State Parties to the 1961 Convention.⁴⁷ The 1954 Convention offers stateless persons a legal status and a number of rights, thus aspiring to fill a protection gap that statelessness creates in areas of the law where nationality matters. The 1961 Convention addresses matters relating to nationality and aims to limit the number of cases of statelessness occurring.⁴⁸ These are bespoke instruments designed, respectively, to prevent statelessness and protect stateless persons.

(a) Acquisition of nationality

Before considering the substantive protection offered to surrogate-born children, it is necessary to consider whether surrogate-born children are *stateless* for the purposes of the 1954 Convention.

The value of the 1954 Convention lies primarily in the definition of a stateless person and the international protection regime it establishes for stateless persons. Article 1(1) provides ‘the term “stateless person” means a person who is not considered a national by any state under the operation of its law’.⁴⁹ The International Law Commission has observed that the definition of stateless person contained in Article 1(1) is now part of customary international law.⁵⁰ A distinction has been made between *de jure* and *de facto* statelessness, and it appears that there is ongoing debate surrounding the meaning of (and the appropriateness of referring to) *de facto* statelessness⁵¹ in spite of the existence of a formal, interna-

⁴⁵ The provisions of each convention must be read in light of subsequent developments in international law, in particular international human rights law. Indeed, several provisions of the CRC are important tools for interpreting, for example, Articles 1 to 4 of the 1961 Convention.

⁴⁶ See status table at the UN Treaty Collection Database at: <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en>. For the purposes of this thesis, France, Austria, Belgium, the Netherlands, Switzerland, and the UK have ratified the 1954 Convention.

⁴⁷ See status table at the UN Treaty Collection Database at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en>. For the purposes of this thesis, Austria, Belgium, the Netherlands, and the UK have not ratified the 1961 Convention.

⁴⁸ While the rules set out in the 1961 Convention operate regardless of whether a child’s birth is registered, registration of the birth provides a key form of proof which underpins implementation of the 1961 Convention and related human rights norms.

⁴⁹ See also Article 1(c) of the Council of Europe Convention on the avoidance of statelessness in relation to State succession (2006) as well as the Explanatory Memorandum to the European Convention on Nationality (1997), para. 33.

⁵⁰ UNHCR, Expert Meeting ‘The concept of Stateless Persons under International Law’, Summary Conclusions, meeting held at Prato, Italy, 27–28 May 2010. See also UNHCR ‘Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons’.

⁵¹ This is evidenced by the differing definitions of statelessness and descriptions of stateless cases in such sources as P. Weis, ‘The United Nations Convention on the Reduction of Statelessness, 1961’ [1962] 11(4) *International and Comparative Law Quarterly* 1073–1096; C. Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ [1995] 7 *International Journal of Refugee Law*; C. Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ [1998] *International Journal of Refugee Law*; C. Collins, ‘The Human Rights of Stateless Persons’ [2006] 28 *Human Rights Quarterly*. L. van Waas critiques the utility of

tionally acknowledged definition. The UNHCR⁵² considers that *de jure* stateless people are not considered as nationals under the laws of any country, while *de facto* statelessness occurs when a person formally possesses a nationality, but the nationality is ineffective.⁵³ Even though the two types of statelessness might be difficult to differentiate, the concept beyond them is significantly different: *de jure* statelessness is related to the violation of the right to a nationality itself, while *de facto* statelessness is often understood as a problem with the rights attached to nationality.⁵⁴

As discussed in Chapter Three, in the context of inter-country surrogacy, *de jure* statelessness is more likely to be of concern, and it is submitted that surrogate-born children benefit from the protection offered by the 1954 Convention (and other instances relating to statelessness) equally with all other children. Clearly then, the proper identification of cases of statelessness is key to the implementation of the standards relating to the protection of stateless surrogate-born children.

The 1954 Convention stipulates that States Parties shall issue identity papers to any stateless person in their territory who does not possess a valid travel document. Article 28 provides that States Parties shall issue travel documents to stateless persons who lawfully reside on their territory, unless compelling and manifest reasons of national security and public order argue otherwise. The issuance of a document does not imply a grant of nationality and does not alter the status of the individual. Article 28(2) invites States to issue travel documents to any stateless person in the territory, even those who are not lawful residents. In practice, it would seem that States Parties are obliged to consider and implement these obligations in the context of stateless surrogate-born children.

de facto statelessness as a 'construct, arguing in particular that it is not grounded in an international legal framework and is highly ambiguous', see L. van Waas in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge 2014).

52 The UN High Commissioner for Refugees is entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention, and reduction of statelessness and the protection of stateless persons.

53 UNHCR *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: <www.refworld.org/docid/53b676aa4.html>. This Handbook has superseded the following Guidelines: Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person; and Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level; and Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04. These Guidelines are intended to provide interpretative legal guidance for governments, NGOs, legal practitioners, decision-makers, and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness. See also UNHCR, 'What is Statelessness?', UNHCR website, available at: <www.unhcr.org/pages/49c3646c158.html>.

54 UNHCR, Expert meeting 'The Concept of Stateless Persons under International Law' Summary conclusions, meeting held at Prato, Italy, 27-28 May 2010, 2.

In an effort to strengthen the international commitment to the provisions of the 1954 Convention, the UN adopted the 1961 Convention. As its name suggests, the focus of the 1961 Convention is the reduction of future cases of statelessness and the eventual elimination of the occurrence of statelessness.⁵⁵ Article 1 of the 1961 Convention prescribes granting nationality under certain circumstances to a child born on state territory. The 1961 Convention has been described in the following terms by the Information and Accession Package that accompanies it:

The 1961 Convention may be seen as consolidating principles of equality, non-discrimination, protection of ethnic minorities, rights of children, territorial integrity, the right to a nationality and the avoidance of statelessness.⁵⁶

Yet it must be recalled that the Convention does not purport to prescribe a general universal policy of nationality attribution but deals only with the reduction in situations of (threatened) statelessness. The 1961 Convention does not require a State Party to unconditionally grant its nationality to any stateless person but rather bases the right to nationality on ties held with a state based on either *jus soli* in Article 1⁵⁷ or *jus sanguinis* in Article 4. The grant of nationality is further contingent on the fact that a person ‘*would otherwise be stateless*’.⁵⁸ Where the 1961 Convention requires that a person shall not lose or be deprived of nationality if this would render him or her stateless, States Parties are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.

To satisfy their obligations, Article 1 of the 1961 Convention therefore provides States Parties with two alternative options for granting nationality to children who would otherwise be stateless born in their territory. States can either provide for automatic acquisition

55 The 1961 Convention is not the first international instrument to deal with the problem of nationality and statelessness. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws introduced some limits on the autonomy of states in nationality matters and one of its aspirations was to ensure that everyone held a nationality.

56 UNHCR, *Information and accession package: the 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness*, Geneva: January 1999, 7.

57 Article 1(1) 1961 Convention: ‘A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law.(...)’; see also para.19 of UNHCR Expert Meeting (Senegal, 2011), *Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: (‘Dakar Conclusions’)* available at: <www.unhcr.org/refworld/docid/4e8423a72.html> and UNHCR Guidelines on Statelessness No 4.

58 UNHCR Guidelines on Statelessness No. 4, para. 18: ‘Children can be “otherwise stateless” if one or both parents possess a nationality but cannot confer it upon their children. The test is whether a child is stateless because he or she acquires neither the nationality of his or her parents nor that of the State of his or her birth; it is not an inquiry into whether a child’s parents are stateless’.

of nationality upon birth pursuant to Article 1(1)(a), or for acquisition of nationality upon application pursuant to Article 1(1)(b). Article 1(1)(b) of the 1961 Convention also allows States Parties that opt to grant nationality upon application pursuant to Article 1(1)(b) to provide for the automatic grant of nationality to children born in their territory who would otherwise be stateless at an age determined by domestic law.⁵⁹ If the state imposes conditions for an application as allowed for under Article 1(2) of the 1961 Convention, this must not have the effect of leaving the child stateless for a considerable period of time.

Both Article 1 and Article 4 present a State Party with the opportunity to impose further conditions on the grant of its nationality to stateless persons, in addition to the *jus soli* or *jus sanguinis* links that exist.⁶⁰ These conditions include that an application under the 1961 Convention is lodged while the applicant is in a prescribed age range, Articles 1(2)(a) and 4(2)(a); that the person has habitually resided in the state's territory for a fixed period of time, Articles 1(2)(b) and 4(2)(b); and that the person has not been convicted of an offence against national security, Articles 1(2)(c) and 4(2)(c) and Article 1(2)(c) also includes that a person has been sentenced to imprisonment for five or more years on a criminal charge and that the person has always been stateless according to Article 1(2)(d) and 4(2)(d).

The use of the mandatory 'shall' in Article 1(1) ('*such nationality shall be granted*') indicates that a State Party must grant its nationality to otherwise stateless children born in their territory where the conditions set forth in Article 1(2) and incorporated in their domestic application procedure are met.⁶¹ States Parties shall provide in their internal law for their nationality to be acquired *ex lege* by foundlings⁶² discovered in their territory who would '*otherwise be stateless*'.⁶³ Likewise States shall provide for their nationality to be acquired by other children born on their territory who do not acquire at birth another nationality; however, in these cases States may choose whether to grant nationality at birth *ex lege* or subsequently upon an application and – if determined necessary – subjected to certain conditions as mentioned above. In broad terms, Articles 1 to 4 of the 1961 Convention⁶⁴ set out safeguards, which, if implemented in nationality legislation, help to avoid situations of statelessness arising at birth for surrogate-born children.

59 UNHCR Guidelines on Statelessness No 4, para. 33: 'A Contracting State may apply a combination of these alternatives for acquisition of its nationality by providing different modes of acquisition based on the level of attachment of an individual to that State'.

60 For a detailed consideration, see L. van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp: Intersentia 2008).

61 UNHCR Guidelines on Statelessness No. 4, para. 37.

62 Where legal parentage is not known, it would be reasonable, in light of the object and purpose of the 1961 Convention, to treat surrogate-born children as foundlings for the purposes of the acquisition of nationality.

63 Neither the ICCPR nor the CRC, mention the particular situation of foundlings.

64 As set out in Article 17 of the 1961 Convention, Contracting States are not permitted to make reservations to Articles 1-4. However, as noted above, some provisions permit Contracting States to make a choice between two or more ways to address statelessness amongst children.

The 1961 Convention does not, however, consider the circumstances in which a child is ‘born to’ a national abroad (i.e. whether genetics, legal parentage, or any other test should be applied). A State Party to the 1961 Convention cannot avoid the obligations to grant its nationality to a person who would otherwise be stateless under Articles 1 and 4 based on its own interpretation of another State’s nationality laws where this conflicts with the interpretation applied by the relevant State Party.

This brings us to the wider problem of the identification of (the risk of) statelessness for the purposes of applying the guarantees set out in the 1961 Convention. The text of the Convention offers no indication as to how State Parties are to determine a risk of statelessness – establishing the fact, for instance, that a child would ‘otherwise be stateless’. As a general rule, the responsibility for substantiating a claim lies with the party which advances that claim. As a result, the burden lies primarily with authorities of the State that is seeking to apply rules for loss or deprivation of nationality to show that the person affected has another nationality or that the person is covered by one of the exceptions allowed for in Article 7 of the 1961 Convention with respect to loss or Article 8 with respect to deprivation of nationality. However, the 1961 Convention fails to address expressly such questions as where the burden of proof lies (with the individual concerned (i.e. in the case of children their guardian) or with the State in question), what types of evidence may be accepted, and what weight is to be given to that evidence. Nor are State Parties compelled to cooperate with a view to confirming the nationality – or statelessness – of an individual. The absence of clarity on how to undertake the task of identification is unfortunate since it can jeopardise the practical and timely implementation of the Convention. As such, there remains a threat that the effectiveness of the instrument will be undermined as States Parties could exclude individuals from the protection of the Convention through their approach to the question of proof.⁶⁵ Despite this concern, the rules for preventing statelessness among children contained in Articles 1(1) and 1(2) of the 1961 Convention must be read in light of human rights treaties, which, as discussed above, recognise every child’s universal right to acquire a nationality, in particular where they would otherwise be stateless. In light of the object and purpose of Articles 1 and 2 of the 1961 Convention and Article 7 CRC (and Article 6(2) ECN, discussed below), States Parties should be encouraged to treat surrogate-born children with no known or certain legal parentage as ‘otherwise stateless’ with respect to the acquisition of nationality. And if a State Party imposes conditions with respect to the acquisition, this must not have the effect of leaving the child stateless for a considerable period of time.

⁶⁵ See ‘Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness’, 21 December 2012, HCR/GS/12/04, paras. 20 and 21.

(b) Loss of nationality on the basis of possession or acquisition of a foreign nationality

It has been discussed that in certain states, such as the UK, a post-birth parental model permits parenthood to be transferred to the intending parents after the birth of the surrogate-born child through court order in certain specified situations. In the UK, the parental order has consequences for the purposes of nationality law.⁶⁶ The determination of legal parenthood – pre or post-birth – may result in a conflict of laws leading to the child's loss of a nationality at birth. What, then, of a surrogate-born child's loss of nationality on the basis of a change in the child's personal status (e.g. a subsequent determination of parentage in favour of the intending parents)?

Articles 5-9 of the 1961 Convention address situations in which individuals who were considered nationals of a State Party under the operation of its law are no longer so considered due to automatic loss of nationality or a decision of the national authorities. Article 5 of the 1961 Convention provides that:

1. If the law of a Contracting State entails loss of nationality *as a consequence of any change in the personal status* of a person such as marriage, termination of marriage, legitimation, recognition or adoption, *such loss shall be conditional upon possession or acquisition of another nationality.* (Emphasis added, MWG)

Article 7(6) provides that:

Except in the circumstances mentioned in this Article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.

For the purposes of Article 5, *a change of personal status* includes events such as marriage and termination of marriage and recognition, legitimation, and adoption of a child. Where states do provide for loss of nationality as a result of recognition, legitimation, or adoption, the 1961 Convention requires that this never results in statelessness as loss must be conditioned on possession or acquisition of another nationality. According to Article 5(1), no change in the personal status of a person may cause statelessness. The list set out in Article 5 is not exhaustive. In addition to the situations explicitly listed in the Article, it has been considered⁶⁷ therefore that this rule would apply in case of a successful denial of paternity

⁶⁶ See Chapter Three at 3.8.6.

⁶⁷ See the Summary Conclusions of the UNHCR Expert Meeting 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality', Tunis, Tunisia, 31 October-1 November 2013.

but also – if a legal system provides for such possibilities – to a denial of maternity as well as to annulment or revocation of a recognition or of an adoption or surrogacy. Indeed the range of situations which fall under Article 5(1) is likely to grow as a result of developments in the area of reproductive technology.

Articles 5(1), 6, and 7(1) allow for loss of nationality where the child concerned possesses another nationality at the moment of loss. They also allow for loss if the person concerned ‘acquires’ another nationality. Statelessness may result when the new nationality is not acquired upon loss of the former nationality. If States Parties allow for loss before another nationality is acquired, they may meet their obligations under the 1961 Convention by providing that the loss is void if the child concerned fails to acquire the new nationality within a fixed period of time. Although not in the context of children, a UNHCR Expert Group has suggested that this time period could be set to one year, with the possibility of extension in cases where it is known that acquisition of a foreign nationality takes more than one year.⁶⁸ It is appropriate that the reacquisition be automatic and the relevant authorities not enjoy discretion regarding issuance of identity documents confirming the nationality of the child concerned.

Article 5(1) also applies if it is established that the parent-child family relationship which constituted the basis of a child’s acquisition of nationality was registered erroneously. This may be very relevant in the context of surrogacy. This includes situations in which the identity of the parent (relevant for *jure sanguinis* acquisition of nationality) has been incorrectly recorded or where it is discovered, after acquisition of the nationality by an *ex lege* extension of naturalisation from a parent to a child, that no parent-child family relationship ever existed.

The 1961 Convention (and the ECN (discussed below)) strictly limits the possibilities for States Parties to initiate the loss of citizenship. Any such loss of nationality must be accompanied by full procedural guarantees; needs to have a basis in national law (loss and deprivation provisions must be predictable); serves a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law; and must be proportionate to the interest which the state seeks to protect. This requires a balancing of the impact on the rights of the individual and the legitimate interests of that state. In assessing the impact on the individual, consideration must be given to the strength of the link of the person with the state in question, including birth in the territory, length of residence, family ties, economic activity, as well as linguistic, social and cultural integration.⁶⁹ The time that has elapsed since the act in question is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. Proportionality is key. The longer the period elapsed since the conduct, the more serious the conduct required

⁶⁸ *Ibid.*, para. 42.

⁶⁹ *Ibid.*, para. 21.

to justify deprivation of nationality.⁷⁰ Loss and deprivation that result in statelessness for a surrogate-born child will generally be arbitrary because the impact on the child far outweighs the interests the state seeks to protect. The 1961 Convention sets out a narrow list of exceptions under which this would not be the case. It should be noted that the Convention does not allow reservations to these provisions or for States Parties to otherwise exclude individuals from the scope of the Convention due to specific types of conduct. These exceptions are to be interpreted in a restrictive manner and in good faith. Where it is permissible to deprive an individual of nationality under the 1961 Convention and international human rights law, it may be appropriate to postpone the act of deprivation until the individual involved has acquired, reacquired, or confirmed nationality or, at a minimum, a permanent residence status elsewhere.⁷¹

It can be concluded that if Article 5 is to be implemented correctly in the context of surrogacy, the provision should be sufficient to prevent the loss of a nationality and mitigate the risk of statelessness in these circumstances. It is suggested that wherever the nationality of a child is withdrawn with the effect of rendering him or her stateless, this is likely to amount to a breach of a State Party's obligations pursuant to the 1961 Convention and, more broadly, arbitrary deprivation of nationality, which, as considered below, is prohibited by numerous international instruments.

(c) Arbitrary deprivation of nationality

Article 15 UDHR stipulates that no one shall be *arbitrarily deprived of nationality*; however, this protection is not absolute inasmuch as it does not preclude the loss of nationality. The prohibition of arbitrary deprivation of nationality is considered to be a fundamental norm of international law, the infringement of which amounts to a violation of basic human rights and fundamental freedoms.⁷² The key element is the prohibition of *discriminatory* deprivation of nationality.⁷³

Article 9 of the 1961 Convention provides: '*A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds*'. Just four prohibited grounds are listed: race, ethnicity, religion, and political affiliation. The way that the provision is formulated implies that this is a restricted list: the words 'or other status' which are commonly included at the end of an inventory of prohibited grounds of discrimination are absent here. The 'Information and Accession package' that accom-

⁷⁰ *Ibid.*, para. 21.

⁷¹ *Ibid.*, para. 24.

⁷² UNHCR Executive Committee, Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons, No. 78, 1995; UN General Assembly, Resolution on the Office of the United Nations High Commissioner for Refugees, A/RES/50/152, 9 February 1996, para. 16.

⁷³ For example, the Universal Declaration of Human Rights and the American Convention on Human Rights. It can also be found in Article 4 of the European Convention on Nationality; Articles 15 and 16 of the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States.

panies the Convention neither lists additional grounds nor does it mention the possibility of other grounds of discrimination being read into this article. Moreover, Article 9 implies that *deprivation* is used here in its narrower sense, thus to prohibit only the withdrawal of nationality on the enumerated grounds. This begs the question: What is deemed to amount to discrimination in the context of surrogacy?

There is no broad reference to non-discrimination in the 1961 Convention or any proclamation that in the implementation of its provisions the principle of equality is to be respected. With these points in mind, it must be conceded that this provision will not cover all conceivable instances of denial of citizenship, including, therefore, surrogacy. Yet the UDHR and the ICCPR add a number of factors relevant to this discussion on discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, birth, or *other statuses*. The enjoyment of all of the rights that are promulgated in these texts is thereby guaranteed universally to all on an equal basis.

Under the general rules of treaty interpretation,⁷⁴ the ordinary meaning of the terms used in the 1961 Convention must be read in their context and taking into account the object and purpose of the Convention. They must also be read in light of subsequent developments in international law, in particular, international human rights law. Thinking beyond the States Parties to the 1961 Convention, as a result of state practice, such as ratification of the treaties mentioned above and adoption by consensus of many international resolutions on nationality, the prohibition of arbitrary deprivation of nationality and the related principle that statelessness is to be prevented have, it is submitted by the UNHCR, crystallised as norms of customary international law.⁷⁵

A tentative conclusion, therefore, is that the combined effect of the right of every child to acquire a nationality at birth and the corresponding provisions on non-discrimination is to outlaw discrimination in the child's access to a nationality at birth.⁷⁶ This means that for the purposes of nationality law no differentiation may be made on grounds of discrimination, in relation to either the child or his or her parents, so as to impact on the child's access to citizenship.

5.4.3 *Relevant UN bodies and other UN instruments*

The UN General Assembly has entrusted the UNHCR with a global mandate to identify and protect stateless persons and to prevent and reduce statelessness worldwide. The UNHCR has a specific role with regard to implementation of the 1961 Convention as the

⁷⁴ Vienna Convention on the Law of the Treaties 1969, Articles 31-33.

⁷⁵ See the Summary Conclusions of the UNHCR Expert Meeting 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality', Tunis, Tunisia, 31 October-1 November 2013.

⁷⁶ The position in the European context is discussed below at 5.4.4.

body to which persons claiming the benefit of the 1961 Convention may apply. Furthermore, the UNGA has specifically requested UNHCR to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation.⁷⁷ Similarly, the UNGA has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality. UNHCR has thus a direct interest in national legislation and legal instruments of regional bodies such as the Council of Europe that impact on the prevention and reduction of statelessness, including through implementing the provisions of the two international statelessness conventions as well as Council of Europe Conventions and Recommendations.

In addition to the UNHCR, the Human Rights Council has also considered the right to a nationality and the prevention of statelessness. Resolution 20/4 adopted by the Human Rights Council⁷⁸ provides:

The right to a nationality: women and children

1. Reaffirms that the right to a nationality is a universal human right enshrined in the Universal Declaration of Human Rights, and that every man, woman and child has the right to a nationality;
2. Recognizes that it is up to each State to determine by law who its nationals are, provided that such determination is consistent with its obligations under international law;
3. Calls upon all States to adopt and implement nationality legislation consistent with their obligations under international law with a view to prevent and reduce statelessness among women and children;
4. Encourages States to facilitate, in accordance with their national law, the acquisition of nationality by children born on their territories or to their nationals abroad who would otherwise be stateless;
5. Urges all States to refrain from enacting or maintaining discriminatory nationality legislation, with a view to avoid statelessness, in particular among women and children;

⁷⁷ Article 11, 1961 Convention: 'The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority'. *See also* UNGA Resolution A/RES/3274(XXIX) of 10 December 1974 on the provisional mandate of UNHCR as the body to which persons claiming the benefit of the 1961 Convention may apply and Resolution A/RES/31/36 of 30 November 1976 which requested UNHCR to continue to perform these functions.

⁷⁸ 16 July 2012 available at: <<http://daccess-ods.un.org/TMP/85517.4008756876.html>>.

[...]

7. Also urges States to grant nationality to foundlings found in their territory in the absence of proof that the foundling is not a national of the State where found.

The UN Resolution does, unfortunately, fall short of an explicit and express obligation to States to grant nationality to children born on their territories who would otherwise be stateless. The Resolution, however, only encourages States to '*facilitate, in accordance with their national law, the acquisition of nationality by children born on their territories or to their nationals abroad who would otherwise be stateless*'. In the context of inter-country surrogacy, with appropriate procedures in place, such as for the exchange of information from one country to another on domestic citizenship laws or for the verification of information such as the nationality or birthplace of the child and the child's parents, the state can ensure that the child will be properly registered. Using the details provided in the birth registration process, government authorities can identify cases of statelessness of newborns or disputed nationality and take necessary practical and timely measures to address the situation and, in the longer-term, reduce the risks of future occurrences.⁷⁹

5.4.4 Regional instruments

Although the right to a nationality is prescribed under several international legal frameworks (considered above), it is not contained as an express provision in the ECHR. In October 2011, however, a judgment on a case relating to gender discrimination in Maltese nationality law was handed down by the ECtHR. In its decision in *Genovese v. Malta*,⁸⁰ the Strasbourg Court applied Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life) to recognise the right of a child to obtain his father's citizenship.

Ben Alexander Genovese was born to a British mother and a Maltese father in 1996. Under (the then) Maltese law, a child born out of wedlock outside of Malta could not obtain Maltese nationality. Ben is a British national. The judges considered that the applicant's right to private life had been violated due to discrimination in Maltese law. They voted six to one that there had been a violation of Article 14 read in conjunction with Article 8. The Strasbourg Court held the '*denial of citizenship*' which raised an issue under Article 8 ECHR, '*because of its impact on the private life of an individual, which concept is*

⁷⁹ UNHCR and IPU, *Nationality and statelessness. A handbook for parliamentarians*, 2005, 31.

⁸⁰ *Genovese v. Malta* (Application No. 53124/09). See G. de Groot and O. Vonk, 'Non-discriminatory access to the nationality of the father protected by ECHR. A comment on *Genovese v. Malta* (European Court of Human Rights 11 October 2011)' EUDO citizenship policy briefs, 2012.

wide enough to embrace aspects of a person's social identity'.⁸¹ It subsequently determined that:

While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that article. Maltese legislation expressly granted the right to citizenship by descent and established a procedure to that end. Consequently, the state which has gone beyond its obligations under Article 8 in creating such a right [...] must ensure that the right is secured without discrimination within the meaning of Article 14.⁸²

The ECtHR could find no reasonable and objective justification for the difference in treatment in terms of nationality rights for a child born in and out of wedlock. Seen in that light, the implications of this decision for other cases regarding nationality that may not, however, involve discriminatory nationality laws should be considered. This is particularly relevant to surrogate-born children compared with children born in other circumstances. If a surrogate-born child is rendered stateless as a result of the application of nationality law, does that mean that there exists a complete violation of that child's identity, regardless of whether there was discrimination in the state's law? Moreover, if a child has been rendered stateless, then domestic law is arguably indirectly discriminatory; for example, it discriminates against children born by surrogacy by omission of the existence of any law protecting them from statelessness in that circumstance. Citizenship cases of stateless individuals could therefore be seen to independently violate Article 8 and be brought before the Strasbourg Court on that basis, without also requiring the applicant to invoke Article 14. What is clear is that access to nationality falls within the scope of protection of the ECHR as part of a person's social identity, which in turn is part of that person's private life. As de Groot and Vonk comment, '[t]here can be no doubt that discrimination is not allowed in cases concerning access to nationality'.⁸³

Although the majority in the *Genovese* judgment does not explicitly state that the denial of nationality is a violation of Article 8 ECHR, the door appears to have been eased open. Indeed, the Strasbourg Court in *Mennesson* notes that while Article 8 ECHR does not guarantee a right to a nationality *per se*, it is established that an individual's nationality

81 *Ibid.*, para. 33.

82 *Ibid.*, para. 34.

83 G. de Groot and O. Vonk, 'Non-discriminatory Access to the Nationality of the Father Protected by ECHR. A Comment on *Genovese v. Malta* (European Court of Human Rights 11 October 2011)' EUDO citizenship policy briefs, 2012, 1.

forms part of the identity of that person.⁸⁴ Moreover, as discussed in the context of Austria, the Austrian Constitutional Court has stressed that the relationship between a child and its parents is protected by the right to family life guaranteed by Article 8 ECHR, and, as a result, a child's right to acquire citizenship by descent of its parents also falls within the scope of Article 8 ECHR.⁸⁵ The implications of the *Genovese* and *Mennesson* decisions could potentially be a very important step in the right to a nationality being accepted under the court's case law.

In other regions, there are also relevant principles which establish the child's right to a nationality and provisions concerning statelessness: for example, Article 20 of the American Convention on Human Rights and Article 6 of the African Charter on the Rights and Welfare of the Child which, in Article 6(4), provides that States Parties must ensure that their constitutional legislation recognises the principles that a child shall acquire the nationality of the state in the territory of which he has been born if, at the time of birth, he is not granted nationality by any other state.⁸⁶ States Parties to the CRC that are also parties to the American Convention or the African Charter on the Rights and Welfare of the Child have a clear obligation to grant nationality automatically at birth to children born in their territory who would otherwise be stateless.

5.4.5 ECN

At a regional level, the ECN requires particular consideration.⁸⁷ The ECN presents principles and rules applying to all aspects of nationality; and it is neutral towards single or multiple nationalities. Currently, there are 20 ratifications of the treaty.⁸⁸ At the heart of the ECN is a set of general principles that have guided the drafting of the instrument and should inform its implementation. These are set out in Chapter II ECN and can be summarised as follows: (1) States are free to determine who are their nationals, within the limits set by international law;⁸⁹ (2) statelessness shall be avoided;⁹⁰ and (3) rules relating to nationality may not be discriminatory.⁹¹

⁸⁴ See *Mennesson*, paras. 46 and 99.

⁸⁵ See Chapter Three at 3.5; Austrian Constitutional Court Judgment of 11 October 2012, B 99/12, B 100/12.

⁸⁶ Note that the phrase 'undertake to ensure' weakens the obligation.

⁸⁷ See G. de Groot, 'Strengthening the position of children: Council of Europe's Recommendation (2009) 13' in *E Hofi di Ley* (Boom Juridische uitgevers Den Haag 2014); L. van Waas, 'Fighting Statelessness and Discriminatory Nationality Laws in Europe' [2012] 14 *European Journal of Migration and Law* 243-260, 246.

⁸⁸ Status table available at: <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=166&CL=ENG>>. There are nine signatures not followed by ratifications.

⁸⁹ Article 3 ECN.

⁹⁰ Article 4, paras. a and b.

⁹¹ Article 4(c) and Article 5 ECN. Similar guiding principles are expressed in Arts. 2-4 of the Council of Europe 2006 Convention on the avoidance of statelessness in relation to state succession.

The ECN contains detailed principles on the acquisition of nationality by children, including mandating States Parties to provide for nationality to be automatically acquired by children, ‘*one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party*’, subject to any exceptions provided for in internal law for children born abroad.⁹² The acquisition of nationality where a child would otherwise be stateless, however, may be preconditioned upon birth within the territory of the state.⁹³ Furthermore, where ‘*parenthood is established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law*’.⁹⁴ It may be thought that, when the ECN speaks of ‘parents’ and ‘parenthood’, it refers to legal parentage and not to the genetic parents of the child. However, this is not clear from the text of the treaty itself leaving it open to interpretation by States Parties (including as to which law to apply if legal parentage is determinative). Article 6(2) ECN perhaps reduces the possibility of statelessness by providing that ‘*Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who does not acquire at birth another nationality*’.

A substantial number of European states limit the transmission of citizenship in the case of birth abroad. From this perspective, the ECN also explicitly accepts – in principle – limiting the transmission of citizenship in case of birth outside the state is acceptable.⁹⁵ Nevertheless, the adoption of the ECN in 1997 has actually ensured that a more comprehensive framework for promoting the right to a nationality is in place in Europe.⁹⁶

The ECN accepts only one ground upon which a person can still justifiably lose their nationality with statelessness as a result: in the event of ‘*acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant*’.⁹⁷ In all other circumstances (including the transfer of parentage⁹⁸), the importance of the avoidance of statelessness is deemed to outweigh any otherwise legitimate interest the state may have in withdrawing a person’s

92 Article 6(1) ECN.

93 Article 6(1)(b) ECN.

94 Article 6(1) ECN.

95 See Explanatory Report on ECN, Nos. 65 and 66.

96 The first convention to be adopted by the Council of Europe with respect to nationality was the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, adopted in 1963. Later this was accompanied by a number of protocols. At the same time, the Committee of Ministers and the Parliamentary Assembly have adopted recommendations and resolutions relating to the enjoyment of nationality and the treatment of (non-)nationals. For instance, as early as 1955, the Parliamentary Assembly passed Recommendation 87 on Statelessness (25 October 1955).

97 Article 7(3) ECN. This is equivalent to Article 8(2b) of the 1961 Convention. Note that in the context of the *Rottmann* case decided by the then European Court of Justice, the fact that the ECN and 1961 Convention tolerate the withdrawal of nationality resulting in statelessness if fraud is at play does not necessarily grant states carte blanche in taking such a decision in practice. The principle of proportionality – between the act of fraud committed and the impact of loss of nationality – must also be satisfied.

98 Article 7(1)(f) ECN.

nationality. This, as the Explanatory Report to the ECN itself points out, can be contrasted with the 1961 Convention which, as discussed above, accepts a short and limitative list of additional situations which, alongside fraud, may also warrant rendering a person stateless (surrogacy is not listed). In other words, states must take into consideration the international repercussions of their domestic nationality legislation, particularly if the application of that legislation may result in statelessness. Moreover, the deprivation of nationality – the engendering of statelessness – is of itself a violation of human rights norms, in particular in relation to children.

The ECN explicitly details an obligation for States Parties to cooperate in order to ‘*deal with all relevant problems*’ concerning nationality, including by exchanging information and conducting consultations. Since the general principles of the ECN include the avoidance of statelessness and non-discrimination in the enjoyment of nationality, these can be considered among the relevant problems to be tackled through cooperation. In practice, the ECN should help to facilitate the identification of stateless people (which may require gaining an understanding of the content and operation of the nationality laws of multiple countries), allowing for a fuller implementation of the prescribed standards relating to the avoidance of statelessness and of facilitated naturalisation procedures.

A recommendation, adopted by the Committee of Ministers on 15 September 1999, sets out principles and provisions, based on the ECN, which are especially relevant to the avoidance and reduction of statelessness.⁹⁹ More explicit in this regard is the Council of Europe’s 2009 Recommendation of the Committee of Ministers on the nationality of children¹⁰⁰ which aims to facilitate children’s access to a nationality, including to the nationality of their parents, and which contains a dedicated section on nationality as a consequence of the establishment of parent-child relationships. The Recommendation contains 23 principles. The first ten principles deal with the avoidance of cases of statelessness. They are followed by principles on the acquisition of nationality on the basis of a parent-child relationship. Two of these principles address general issues of the application of the *jus sanguinis* principle. In relation to adoption and nationality, four principles are formulated. One principle regards the access of children to the nationality of their country of birth. Another principle deals with the protection of the possession of nationality in case of treatment as a national during a considerable period of time, in other words: the protection of legitimate expectations. Five rules deal with the legal position of minor children in respect of decisions related to their nationality position. And lastly, it is recom-

⁹⁹ See Committee of Ministers of the Council of Europe, Recommendation No. R (99) on the avoidance and reduction of statelessness, 15 September 1999.

¹⁰⁰ Adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers’ Deputies: Recommendation CM/Rec (2009) 13.

mended to provide for the immediate registration of the birth of a child born on the territory of a Member State of the Council of Europe, without any exception.¹⁰¹

Principle 1 of Recommendation 2009/13 prescribes that States Parties should ‘*provide for the acquisition of nationality by right of blood (jure sanguinis) by children without any restriction which would result in statelessness*’. Article 6 (1) ECN allows some specific exceptions on the acquisition *jure sanguinis* and does not exclude expressly cases of statelessness. According to that provision each State Party shall provide in its internal law for its nationality to be acquired automatically by a child, one of whose parents possesses at the time of the child’s birth the nationality of that state. However, States Parties are allowed to make exceptions for children born abroad and to provide for special procedural rules for the acquisition of nationality *jure sanguinis* for children whose parenthood is either established by recognition, by court order, or by similar procedures. Several European states use this possibility to make an exception to the principle of the acquisition of their nationality *jure sanguinis* for children of nationals who were born abroad or born out of wedlock as child of a father who is a national.¹⁰² This exception reflects that a nationality should be a manifestation of a genuine and effective connection between a person and the state concerned but should never cause statelessness.

Principle 2 recommends States Parties to ‘*provide that children born on their territory who otherwise would be stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent*’. This principle is supplementary to the obligations already existing in Article 6 (2) ECN and the corresponding provisions of the 1961 Convention on the reduction of statelessness. A clear majority of Member States of the Council of Europe grant their nationality to potentially stateless children born on their territory automatically at birth.¹⁰³ Most other Member States provide for a right of registration as a national or acquisition of nationality via lodging a declaration after a certain period of lawful and habitual residence. However, this latter option leaves the child stateless for a considerable period of years. The Explanatory Memorandum on Recommendation 2009/13 (hereinafter, the ‘Explanatory Memorandum’) indicates that this acquisition should ideally occur at birth or shortly after birth with retroactivity, but the principle allows for the acquisition of nationality without retroactive effect.

Principle 3 recommends that the state of birth or residence should provide the child ‘*with any necessary assistance*’ to exercise their right to acquire the nationality of the parent. The obligation to document the existence of the child and his parentage in a birth certificate

101 G. de Groot, ‘Strengthening the Position of Children: Council of Europe’s Recommendation (2009) 13’ in *E Hofi di Ley* (Boom Juridische uitgevers Den Haag 2014), 468.

102 See, for example, the position in Switzerland discussed in Chapter Three at 3.4.4.

103 Some states do so with the additional condition that the parents have lawful and habitual residence in the state at the time of birth of the child.

is in this context of paramount importance (Principle 23).¹⁰⁴ The Explanatory Memorandum notes that it may be necessary to appoint a special guardian *ad litem*, who can represent the child.

Principle 6 calls on States to ‘*co-operate closely on issues of statelessness of children, including exchanging information on nationality legislation and public policies, as well as on nationality details in individual cases, subject to applicable laws on personal data protection*’.

The Recommendation reiterates the ECN concerning the situation of children born whose parentage is established by acknowledgement, court order, or similar procedures, but the Explanatory Memorandum clarifies that while States may determine whether parentage has been successfully established in law (e.g. whether an acknowledgement was validly undertaken or whether a foreign decision on parentage can be recognised), additional substantive requirements or conditions for a child to acquire nationality by descent (e.g. the child must also be habitually resident in the State) are not permitted.¹⁰⁵ Further, Principle 12 provides that for children born following ART (including surrogacy) States Parties should, ‘*apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law*’.¹⁰⁶ While the Explanatory Report makes clear that the establishment or recognition of the parent-child relationship is not obliged (being dependent upon the internal and PIL rules of the state), ‘*the principle [...] underlines that if recognition takes place this should also have consequences in nationality law*’.¹⁰⁷

Taking Recommendation 2009/13 to its highest, it does not oblige the recognition of the child-parent relationship as an automatic consequence of the use of inter-country surrogacy. Whether such recognition takes place depends on the PIL and – if applicable – the domestic law of the country of the intending parents. However, Principle 12 underlines that if recognition takes place, this should also have consequences in nationality law. Principle 12 that Contracting States ‘*apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law*’. The Explanatory Memorandum adds:

In order to avoid cases of statelessness, the following rules should be observed.
If the child-parent family relationship is recognised in the state of nationality

¹⁰⁴ Principle 23 underlines that states should ‘register the birth of all children born on their territory, even if they are born to a foreign parent with an irregular immigration status or if the parents are unknown’.

¹⁰⁵ See Principle 11.

¹⁰⁶ See Principle 12.

¹⁰⁷ Para. 33 of the Explanatory Report.

of the intended mother or father the provisions of that state on the acquisition of nationality *jure sanguinis* have to be applicable. The child will be fully integrated into the family of the intending parents, which justifies – as in the case of adopted children – the acquisition of the nationality of the parents. Moreover, in many cases the authorities of the state of the intending parents will not be informed about the fact that the woman mentioned as the mother on the birth certificate did not give birth to the child. If this fact is discovered by these authorities after a considerable period of time, it should not lead to loss of nationality.

This is the first explicit mention in regional or international work that (1) identifies that the relevant ‘child-parent family relationship’ for the acquisition of nationality should be established or recognised in law (i.e. legal parentage, not genetics, is determinative) and (2) identifies that where States establish or recognise such legal relationships, they should accord them the concomitant legal consequences in nationality law without discrimination.

Principle 17 recommends States to ‘*facilitate the acquisition of nationality, before the age of majority, by children born on their territory to a foreign parent lawfully and habitually residing there. Enhanced facilitation should be offered in cases where that parent is also born on their territory*’. According to the Explanatory Memorandum, it is extremely likely that the child born on the territory of that state with a parent lawfully and habitually residing there will be integrated into that state, and this fact justifies facilitation. Therefore, Article 6(4)(e) of the ECN prescribes the facilitation of naturalisation. Principle 17 implies that a state should not delay the facilitated access to its nationality until the child reaches the age of majority.

It is left to the States Parties to determine how they want to facilitate the access to their nationality for the children concerned.¹⁰⁸ They may, for example, provide that a child acquires *ex lege* their nationality if the parent has resided lawfully and habitually in the state in question for an uninterrupted period of ten years, immediately preceding the birth of the child, and is in possession of a permanent residence permit. But it would also be in line with this principle to require that the parents may apply for naturalisation of their child as soon as the parent fulfils certain conditions or, e.g. when the child has resided habitually for a specified period and has reached a certain age.

Notwithstanding the duty for States Parties to cooperate in order to address relevant problems, the ECN, like the 1961 Convention, stops short of establishing an actual enforcement mechanism. Nor does it denote a supervisory role for European Court of Human Rights although, as discussed above, that court has considered questions of

¹⁰⁸ See for the state practice on this point: M. Vink and G. R. de Groot, ‘Birthright Citizenship: Trends and Regulations in Europe’, November 2010, EUDO Citizenship Observatory, Table 4.

nationality. Review of the implementation of the ECN is thus left to the internal system of the state, but the exchange of information among State Parties is of course of practical importance. Each State is obliged to provide the Secretary General of the Council of Europe, as well as other States Parties should they request so, with information on their national legislation and developments concerning the application of the ECN.¹⁰⁹

5.5 SOME CONCLUDING OBSERVATIONS ON A SURROGATE-BORN CHILD'S RIGHT TO A NATIONALITY

As seen with respect to the assessment of the international standards as applied to nationality and the prevention of statelessness in the context of surrogacy, there are conflicting principles: there is the international legal principle within human rights law saying that human rights are for everybody – they are universal principles; there are those principles which are based on the exclusivity of citizenship to the domestic realm; and although the right to a nationality is recognised in the UDHR and nationality should be granted where the alternative is statelessness, it still remains unclear as to whether this constitutes an obligation of customary international law.¹¹⁰ Because these standards accept that it is reasonable to restrict the membership of a community (i.e. citizenship of the state), the question to ask are: What kind of restriction is in place and what discretion is permissible?¹¹¹ In line with the emerging international consensus that nationality laws and practice must be consistent with general principles of international law, particularly human rights law, the Inter-American Court of Justice has held:

Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights.¹¹²

¹⁰⁹ Article 23(1) ECN.

¹¹⁰ It should be repeated that the principal conventions against statelessness have to date secured a limited number of ratifications.

¹¹¹ The Permanent Court stated in the *Oscar Chinn* case, PCIJ (1934), ser. A/B, No 63, 65, that 'the form of discrimination which is forbidden is, therefore, discrimination based on nationality and involving differential treatment as between persons belonging to different national groups'.

¹¹² Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).

Consequently, it is said that:

State discretion in the granting of nationality is not completely unfettered. Thus, international law has established two principal restrictions on State sovereignty over the regulation of citizenship: first, the prohibition against racial discrimination, discussed above; and second, the prohibition against statelessness. Each of these is buttressed by the prohibition on arbitrary deprivation of citizenship.

The Inter-American Court of Human Rights explained in a 2005 ruling:

At the current stage of the development of international human rights law, this authority of the States is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness.¹¹³

Two principles, therefore, lie at the heart of present international law, in terms of its influence on the regulation of nationality for surrogate-born children. Firstly, states must guarantee that the right to a nationality is enjoyed on equal footing by all children, in accordance with the principle of non-discrimination.¹¹⁴ Secondly, states have an obligation to prevent, avoid, and reduce statelessness. This means that states have obligations under international human rights law to respect a child's right to a nationality and to avoid the statelessness of a child born through a surrogacy arrangement.¹¹⁵

It follows from what has been said that in order to arrive at a satisfactory interpretation of the right to a nationality, it is necessary to reconcile and balance this right with the established principle that the conferral and regulation of nationality falls within the jurisdiction of the state with the further principle that European and international human

113 Inter-American Court on Human Rights (2005) *Yean and Bosico v. Dominican Republic*, Series C, Case 130, para. 140.

114 Note that 'all nationality laws have distinctions and not all persons will be equally connected with all States. Nevertheless, in some cases persons are unable to acquire nationality in any State despite very strong ties which are sufficient for the grant of nationality to other equally-situated persons. There may be either overt discrimination or discrimination created inadvertently in the laws or through their implementation'. United Nations High Commissioner for Refugees, Guidelines: Field Office Activities Concerning Statelessness, Field-Office Memorandum No. 70/98, 28 September 1998, 6.

115 See also the findings of Y. Ergas, 'Thinking "Through" Human Rights: The Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy' in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 27, 437.

rights law (as the case may be) imposes certain limits on the state's power.¹¹⁶ It can also be said that human rights treaties do not contain a right to a nationality of choice. However, in the context of this thesis, it is important to note that '*every child has the right to acquire a nationality*'.¹¹⁷ The recognition of the child as a citizen requires some concrete measures such as an immediate registration at birth and the provision of a nationality. But from the CRC perspective, a broader approach is needed. This means *inter alia* the full respect for and implementation of the rights of every child in order to allow her or him to live an individual life in society and to facilitate that child's active and constructive participation in the community. It requires that we acknowledge the child's growing autonomy and identity.

As to the prevention of statelessness at birth, there is evidence of a growing consensus among states that nationality should be granted by *jus soli* to a child who would otherwise be stateless. This conclusion is particularly reinforced by recent developments on the African¹¹⁸ and European continents, which are a step behind the American Convention on Human Rights in providing for *jus soli* attribution of nationality to avoid original statelessness.

With regard to statelessness resulting from loss, renunciation, or deprivation of nationality, international human rights law does no better job than the 1961 Convention. The only (regional) instrument to move to eradicating statelessness is the ECN withdrawal of nationality resulting in statelessness only when that nationality was originally obtained under false pretences. Although it is conceded that this approach is not necessarily illustrative of an international consensus on the subject. Until an international convention, treaty body, or international court explicitly address this question, it will remain unclear in which exact legitimate circumstances the creation of statelessness in this manner is or is not permissible.

Moving then from theory to practice, the comparative research in Chapter Three suggests that no child following a surrogacy arrangement has remained stateless in perpetuity. In a number of states, judicial or administrative authorities have attempted to create at least partial remedies, in particular to attempt to enable a child born from an inter-country

116 Paraphrased from the Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), para. 38.

117 Article 24(3) ICCPR; Article 7(1) CRC.

118 *IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v. Kenya* 002/09. The African Children's Rights Committee in 2011 dealt with the failure of Kenya to register and provide nationality to children of Nubian descent in the country. The Committee held Kenya in violation of the African Charter on the Rights and Welfare of the Child: '... although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness'. (para 48).

surrogacy arrangement to enter the home state of the intending parents and declare the surrogate-born child as a national of that state. These remedies have been applied principally in the context of non-contested surrogacy arrangements, and these solutions have often been based upon recognition that the pre-eminent consideration must be the best interests of the child. Some states have responded with legislation.¹¹⁹ Certainty and consistency in approach is something which is much needed.

At a European level, the Council of Europe, through Recommendation 2009/13 (discussed above), recommends in Principle 12 that Contracting States '*apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law*'. However, the Recommendation does not resolve situations across Europe in which the legislation or policy of the state of the intending parents does not establish or recognise the relationship between the intending parents and the child. However, Principle 12 underlines that *if* recognition takes place, this should also have consequences in nationality law. Nevertheless, it is preferable that a child born as a result of a surrogacy arrangement should automatically acquire the nationality of the intending parents' home state (or of one of the intending parents, if they are not nationals of that state). In the event that the home country is unwilling or unable to confer citizenship, it is submitted that the burden falls to the country of birth to ensure that the child does not remain stateless. It must be remembered that popular surrogacy destinations such as India, Mexico and Ukraine continue to lack (federal) regulation on surrogacy – not least in the context of citizenship – and consequently, the risks of the surrogate-born child being stateless are heightened with the consequence of protracted immigration procedures.

5.6 CONCLUSIONS AND RECOMMENDATIONS

While some states have worked towards accommodating the difficult consequences of surrogacy, whether through judicial deliberations, the application of step-parent adoption

¹¹⁹ See the discussion with respect to Austria in Chapter Three at 3.5.5. See also Section 8 of the Australian Citizenship Act 2009, which enables citizenship to be granted in surrogacy arrangements, but only in cases where legal parentage has been transferred under the state-based surrogacy transfer laws. This would exclude international arrangements and those where the surrogate was paid. In order to gain citizenship an application for citizenship by descent can be made under section 16(2) of the Australian Citizenship Act 2009. To be granted, at least one intended parent must prove a genetic link, and it must be shown that one intended parent has legal parentage in the birth jurisdiction, and that the birth mother has relinquished her rights. If the surrogacy was carried out in countries that legally uphold and enforce surrogacy contracts, then this ability to compel the birth mother to relinquish the child is a factor in favour of granting citizenship. Children born in countries that do not provide for this such as Thailand must wait for Thai passports and a visa to travel to Australia, where an application can then be made for a parental responsibility order. While these do not give full parental status, they will be enough for citizenship by descent once the child is already in Australia.

rules, through the publication of governmental guidance or discretionary *ad hoc* measures; others have refused to do so often on the basis of public policy. It must be acknowledged that not all states are happily facilitating the recognition of the legal parenthood of a child born through surrogacy or issuing travel documents within a reasonable time following the birth even when nationality has been granted.¹²⁰ That being so, and against the background of accepted international human rights standards, the following recommendations¹²¹, set out in suggested order of priority, are made to ensure that children born by way of surrogacy are not left stateless:

- i. Firstly, it is submitted that if the home state of the intending parent(s) recognise(s) the parent-child family relationship between the child and the intending parent(s) established in the country of the surrogate mother, the child should have access to the nationality of the intending parent(s) under the same conditions as a child born to the intending parent(s) and there is a primary duty on the state in this regard. The answer to the question whether or not the family relationship is established or recognised should be considered in the light of the child's best interests¹²² (and the rights of the child, more generally) and should be answered in the affirmative if the child is genetically the son or daughter of one of the intending parents.¹²³ In the context of the Contracting States to the ECHR, where private and family life between the child and the intending parent(s) is established, the application of nationality rules falls within the scope of protection of Article 8 ECHR as part of the child's social identity and the application of those rules must be free of discrimination.¹²⁴

Nationality law should be amended to provide expressly for cases of surrogacy. Austria offers an example of a state that has provided legislative certainty in this manner.¹²⁵

120 See the discussion with respect to the UK in Chapter Three at 3.8.6. The delay in the issuance of travel documents may well raise welfare concerns for the child if, for example, the visa of the intending parents expires before a travel document is issued.

121 See also G. de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge 2014), 168.

122 See the discussion in Chapter Four at 4.15.

123 While unusual, there may be exceptional circumstances such as a family donor arrangement where there is nonetheless an established family relationship which distinguishes this from inter-country adoption.

124 Recommendation 2009/13 and the consideration of the ECtHR in *Genovese*.

125 Section 7(3) Citizenship Act (*Bundesgesetz mit dem das Staatsbürgerschaftsgesetz geändert wird*) was amended on 30 July 2013. A surrogate-born child will be able to acquire citizenship at birth if, according to the law of the country where the child was born, an Austrian citizen is the legal mother or father of the child and if the child would be stateless unless it acquired the Austrian citizenship at birth. The UK offers an example as discussed in Chapter Three at 3.8.6. Norway also offers an example, albeit a temporary one. On 8 March 2013, the Norwegian Parliament added Article 5a to the Norwegian Citizenship Law, which states that in cases where a child born to a surrogate mother abroad and parenthood is lawfully transferred to a Norwegian citizen, the child automatically receives Norwegian citizenship. This new paragraph follows from a temporary law passed on 8 March 2013 on the transfer of parenthood. It is recorded by E. Olsen in the EUDO database: 'The law was passed to secure the rights of children born by surrogate mothers before a permanent legal solution is decided by the Norwegian Parliament. It is still unclear what a more permanent solution may

Even without an amendment to domestic nationality law, a discretionary grant of nationality should be possible not least where one of the intending parents is genetically related to the child. In the UK, where surrogacy has caused problems for the acquisition of a nationality, this has been addressed through a discretionary power of the Secretary of State provided under the British Nationality Act to register a child as a national upon application.

- ii. Secondly, if the home state of the intending parent(s) does not recognise the parent-child family relationship between the child and the intending parent(s) established in the country of the surrogate mother, it is submitted that the child should possess the nationality of the surrogate mother if the child otherwise would be stateless. Any subsequent post-birth transfer of parentage from the surrogate mother to the intending parent(s) is a *change of personal status* for the purposes of Article 5 of the 1961 Convention and, within the European context, within the scope of application of Article 7(1)(f) ECN. The list in Article 5 of the 1961 Convention is not exhaustive. The fact that the surrogacy arrangement is concluded before birth does not exclude the applicability of that article (or Article 7(1)(f) ECN), if the transfer happens after birth with retroactivity in terms of the parental status.¹²⁶
- iii. Thirdly, in the event that the home state of the intending parent(s) is unwilling or unable to confer citizenship and the argumentation at (ii) above is not accepted, it falls to the state of birth to ensure that the child does not remain stateless. The presumption that states must grant their nationality either immediately at birth or as soon as possible after birth is most evident in states that are not only parties to the CRC and ICCPR but also to regional human rights instruments, in particular the ECN,¹²⁷ American Convention of Human Rights, and the African Charter on the Rights and Welfare of the Child. Article 20 of the American Convention and Article 6 of the African Charter explicitly establish that children are to acquire the nationality of their country of birth if they would otherwise be stateless. States have an obligation under international human rights law to avoid the statelessness of a child born through a surrogacy arrangement. A child born in the territory of a State Party to the 1961 Convention without having a legal parent (e.g. because the woman who gave birth to the child is legally not recognised as the mother) should immediately acquire the nationality of the state of birth. This is supported by Article 1 of the 1961 Convention and, in the European context, by Article 6 ECN. The following position could be adopted (with

look like as surrogacy is at the present not legalised by Norwegian law. The temporary “surrogacy law” will be revoked on 31 December 2015 and art. 5a of the Citizenship Law will then also be revoked’. See <<http://eudo-citizenship.eu/news/citizenship-news/1030-update-on-2012-and-2013-revisions-of-norwegian-citizenship-law-procedural-issues-and-citizenship-for-infants-born-abroad-to-surrogate-mothers>>.

¹²⁶ That is also the case in most legal systems with rules on parentage by recognition and legitimation.

¹²⁷ Article 4.

- consequential amendments to the state of birth's nationality laws): a state shall grant its citizenship at birth to a child born on its territory in cases where the parents are unknown or who do not have that state's citizenship, and the child would otherwise be stateless.¹²⁸ Under these circumstances, it is reasonable to look to the state of birth for a solution, for if that state has legislation or practice which creates statelessness, it is that state which should resolve the problem.¹²⁹
- iv. More broadly and in this era of ART, states should also consider and amend (clarify) as necessary the legal definitions of 'parent', 'mother', and 'father' for the purposes of nationality law.¹³⁰

The overall impression is that the international community has begun to consider newly identified sources of statelessness, of which surrogacy is one such source. The UNHCR has recommended to states the ratification of the 1954 and 1961 Conventions; such recommendations are of paramount importance to these children even if neither Convention expressly resolves in any specific manner the conflicts relevant to surrogacy. Moreover, the UNHCR recommends the creation of specific stateless determination procedures, which could assist States Parties to meet their obligations under the 1954 and 1961 Conventions.¹³¹ It seems feasible that surrogacy, as a new source of statelessness, could be addressed through an elaboration of existing mechanisms, expanded involvement of and consideration by the UN treaty bodies, and a more resolute focus on the specific problem of the prevention of statelessness. The role and contribution of the UNHCR would be invaluable.

While it would be possible to revise or amend the 1961 Convention (assuming a consensus could be reached by the States Parties) with a protocol addressing nationality and statelessness in the context of surrogacy and, more broadly, the developments in the area of reproductive technology, it is perhaps unlikely that such an approach is likely to be accepted. Focus is arguably better spent in tracing, developing, and better utilising existing law and applying this to circumstances of surrogacy. Seen in this light, the Human Rights Committee and/or the Committee on the Rights of the Child should consider a General Comment on the right of a child to a nationality in order to clarify the application of the Convention (and international human rights law) where a surrogate-born child (or more

128 More broadly, N. Lowe makes this recommendation in his paper to the Council of Europe on the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation (CJ-FA (2008) 5).

129 As to a surrogate-born child's nationality in India, the Draft Bill discussed in Chapter Three at 3.9.4 addresses the nationality status.

130 See the examples of Australia and Canada set out in Chapter Three at 3.15.

131 UNHCR 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (5 April 2012) HCR/GS/12/02 available at: <www.refworld.org/docid/4f7dafb52.html>.

broadly in the context of assisted reproductive procedures) would otherwise be stateless.¹³² Any Comment (or Recommendation) should reaffirm the full application of existing international law and human rights standards to the situation of nationality and the prevention of statelessness. This could be achieved through a restatement of the entire catalogue of relevant rights, a technique employed in other instruments such as the CRC and the Convention on the Rights of Persons with Disabilities.¹³³ As concluded in Chapter Four, any General Comment should also address birth registration (registration of the birth provides proof of descent and of place of birth and therefore underpins implementation of the 1961 Convention and related human rights norms). Although this route would not result in a binding legal instrument, it is a goal that should be relatively readily attainable in the short term and it would help to remove the current ambiguities surrounding the interpretation of the relevant international norms. The UN treaty bodies could, for instance, also commit to paying greater attention to the problems faced by stateless children related to surrogacy (and ART practices, more broadly) when considering State Party reports as part of the UPR

The issue of stateless children as a result of inter-country surrogacy arrangements is, and should be, a matter of concern to all nations, as well as the individuals concerned. Not to provide for the acquisition of citizenship for these children coupled with the absence of immigration policies and practices is to leave these children in legal limbo. While steps have been taken in a small number of states and, for example, by the Committee of Ministers of the Council of Europe with the adoption of a Recommendation on the nationality of children, the social, legal, and global changes in cross-border surrogacy matters, and their impact on nationality require further attention, particularly in reference to the identification and analysis of statelessness situations and obstacles to the acquisition of nationality.

¹³² There is no reason to limit any General Comment to surrogacy. Indeed, it is advisable that the task, should it be undertaken, considers broader ART-related matters.

¹³³ The 2006 Convention on the Rights of Persons with Disabilities is *available at*: <www.un.org/disabilities/convention/conventionfull.shtml>.

6 WHERE TO FROM HERE?

It has been established that the issues raised by inter-country surrogacy touch upon difficult questions of the law of parenthood, private international law, nationality, and, more broadly, (international) human rights law and public policy. It has also been established that often the family created through surrogacy does not usually fit comfortably into the existing national legislative framework, and, as a result, in many states, the rights of these children – for example, rights to a nationality, to information about his or her origins, and to private and family life – lack the protection afforded to other children whose family structures are recognised and protected by law. Despite the existence of relevant national and international law (albeit not bespoke in the context of surrogacy), the study has highlighted areas of concern and examples of unlawful practices, and there is reason to anticipate that without state action, these practices are likely to continue to multiply. At a macro-level, the continuation of the *status quo* with its spectrum of problems is unsatisfactory and should therefore not be encouraged; for whatever the view taken, surrogacy, as a practice, needs regulation.

6.1 KEY FINDINGS

Two research questions were put forward for this study. First, do national laws on parenthood and the establishment of nationality at birth sufficiently protect the interests of the surrogate-born child? Second, do existing national rules need to be amended or clarified and/or are new rules or agreed principles or standards at a domestic, regional, and/or international level needed in order to protect the rights of these children in conformity with European and international human rights law? This study has found the following.

It emerges from the comparative review that a position taken by a state to prohibit or to regulate surrogacy (and, more broadly, associated medical issues concerning access to ART) depends for a large part on a state's positions with respect to procreation, affiliation, and parenthood. As a result, as the discussion in Chapter Two sets out, a number of diverging positions have been adopted. Whilst the jurisdictions that prohibit surrogacy view it as *per se* exploitative and commodifying human reproduction, others see surrogacy as a way to respond to infertility and childlessness, perhaps also to promote economic opportunity, and to provide women who wish to be surrogates a measure of autonomy. Somewhere in the middle are those jurisdictions that allow surrogacy because they accept that the practice occurs (lawfully elsewhere) but do not believe that paying for surrogacy beyond reasonable expenses is acceptable.

A number of conclusions can be drawn.

First, and importantly, the discussion in Chapter Three contained a detailed critique of the confusion, complexity, gaps, and anomalies in each of the national approaches to surrogacy. There appears in most of the research legal systems to be a policy vacuum within which surrogacy has developed in a haphazard fashion. It has emerged from the comparative review that there are currently few national laws and no express international laws which make provision for parentage either from the perspective of the intending parents, surrogates, or most importantly the child. Moreover, there is no specific international instrument, which deals with the recognition of parental statuses, following an administrative or judicial process in a state where such arrangements are lawful.

The case law reviewed in Chapter Three presents a confusing picture and illustrates that no matter whether recognition of a parental status is sought by way of a legal act, fact, or judgment, a strict application of national law may, in an inter-country surrogacy context, lead to non-recognition or non-establishment of the legal parentage of the intending parent(s) (in particular, legal maternity) established under foreign law on the application of the state's public policy exception.¹ Assessing these public policy issues may be complex and time consuming for the individual parties and the state.

The differing recognition policies at the national level and the lack of a specific legal instrument dealing with recognition of civil status documents at the supranational level may result in a situation that a parental status established in one state may not be recognised in another state after that child's movement or migration. The consequence of the non-recognition is the non-continuity of the child's personal status and thus a (multiple) limping legal relationship. Thus, for instance, a prebirth parental judgment in California or a post-birth parental order obtained in the UK may not be recognised (automatically) in, for example, France or Switzerland.

At the national level, whilst a number of states have legislation regulating or prohibiting the practice of surrogacy, very few states have specific legislation and legislative frameworks addressing inter-country (commercial) surrogacy. There are very real concerns that inter-country surrogacy exposes intending parents, surrogates, and gamete donors to potentially unsafe or less safe clinical practices, inadequate provision for children's current and possible future needs,² inadequate oversight to ensure the informed consent of surrogates, and uncertain (often conflicting) legal regimes.³ It is clear that, at a macro-level, the rights of individuals and the obligations of states in this area are not yet widely or well understood.

1 The differences in substantive and private international law rules may pose problems not just for the recognition of the content of a civil status act but for the recognition of its effects.

2 *E.g.* some surrogates never meet the intended parents who are left with no avenue if the child later wishes for more information or contact. Egg donation is routinely practised on an anonymous basis.

3 Surrogates may be unable to relinquish parental status under national law. The practice of granting birth registration to intended parents in India is actually a matter of administrative practice with no legislative basis.

Second, a careful legal analysis of the existing international human rights law in this area shows, however, that these human rights standards only in very clear cases provide clear and legally binding obligations for states. And how these human rights and principles are understood and translated into practice lacks consistency. The desire to have a child cannot justify the exploitation of surrogate mothers or any form of inhuman treatment of children. In other words, human rights have to be balanced against legitimate public interests – as enumerated, for example, in Article 8(2) ECHR – and against other human rights of the child and other persons involved. There may well be relevant differences that compel different legal analyses depending on the specific circumstances. States have an obligation to review and revise, as necessary, any related laws, policies, and practices in the context of surrogacy to ensure that they support all human rights obligations. In the absence of objective reasons in the circumstances of a particular case, denying children legal recognition of the parentage of intending parents seems a disproportionate response to the problems that a state fears may arise from the violation of public policy or any national prohibitionist law. Moreover, the response does not appear to be well geared to discouraging inter-country surrogacy. The examples and case law cited in Chapter Three demonstrate that non-recognition resulting in non-continuity of a child's personal status affects the interests of that child in terms of legal certainty, intimacy,⁴ and predictability; it interferes with that child's legitimate expectations and arises confusion. Without the recognition, stability, and predictability of family status, children may suffer the stigma of knowing their families are somehow lesser.

Rendering these families 'illegitimate' and, in most states, accepting an asymmetry in the legal position of both intending parents (privileging male (genetic) parents at the expense of female or second parents) have done little to deter their formation, as the perceived increasing uptake in the incidence of reproductive travel⁵ makes all too evident. A state's recognition policy should be reconciled with the obligations of international human rights law.

None of this discussion is to deny that surrogacy raises significant socio-ethical questions, which merit close scrutiny, or to suggest that states are faced with a *fait accompli*. Democratic decision-making is an appropriate process to respond to surrogacy, so long as that process does not abridge or ignore fundamental rights. Although a concern for these children's best interests is clearly evident, other crucial policy concerns are less apparent in practice: for example, health policy and reproductive freedom from the perspective of the surrogate and the intending parents. A human rights approach to surrogacy demands that we acknowledge the responsibility of governments to protect and realise the

4 Decisions about parentage are among the most intimate that an individual can make. This is true for all persons, whatever their sexual orientation.

5 R. Storrow, "The Phantom Children of the Republic": International Surrogacy and the New Illegitimacy' [2012] 20(3) American University Journal of Gender, Social Policy and the Law.

rights of all persons within their jurisdiction, including non-citizens. This responsibility translates into a legal obligation on governments to work towards protecting the rights of these children and the parties to the surrogacy arrangements. To fail to respond to these legal and regulatory challenges at the national and supranational level is untenable, and the recommendation must be that there is a need for states to (re)consider their national approach to (inter-country) surrogacy.

Third, it has emerged that (in most of the reported cases), persons who are willing to act as surrogates, whether for altruistic and/or, more usually, commercial reasons, often wish to be assured that their status of parent, which would usually be ascribed to them at the birth of the child, can be revoked and vested in the intending parent(s). On balance, there have been few known cases (if reported at all) of inter-country surrogacy where a surrogate has refused to give up the child she has given birth to; this may be because of the sums of money involved and/or the fact that in most cases, the surrogate has no genetic relationship with the child. Equally, the comparative review has demonstrated that for many people, surrogacy is often the end of a long road of trying to start a family, after medical reasons have ruled out a pregnancy and adoption is considered but is not appropriate or available for some reason. These couples (and individuals) are willing to go to great lengths, often circumventing national law (to the extent known or identifiable) to find ways to bring about their intending parenthood, and, in many of the cases considered as part of the comparative review in Chapter Three, it is understandable why intending parents resort to surrogacy. However, the inevitability of inter-country (commercial) surrogacy does not of itself justify a broad permissive regulatory regime if the practice (or particular aspects of it) is deemed to be contrary to international human rights law.

Fourth, in terms of the type of surrogacy arrangements being undertaken in an international context, the review demonstrates that by far the most common are gestational, using either a donor egg (most commonly) or the egg of the intending mother (where possible) and the sperm of the intending father (where possible), and commercial, rather than altruistic. The intending parents usually provide the genetic material for the baby or, if this is not possible, Indian, European, or American sperm and/or egg donors are sourced. Whilst seemingly more rare, traditional surrogacy arrangements (i.e. using the egg of the surrogate) do still take place in some states. As a result, distinctions are often drawn in both the state of birth and the home state of the intending parents between different cases depending upon the genetic relationship between the intending parents and the child.

The distinction between altruistic and commercial surrogacy is also a dominant feature in this context. Initial impressions suggest that many of the cases involve commercial, for-profit, arrangements. Commercial surrogacy is more controversial than altruistic surrogacy as it raises specific questions of the commodification of women, children, and reproduction in general and risks of exploitation (public policy issues); yet the distinction between altruistic and commercial surrogacy remains opaque, and, as considered in Chapter Three,

no clear distinction can be deduced. Irrespective of the position adopted by a state, those who cannot engage surrogates at home travel abroad where they can. It should therefore be anticipated that instances of inter-country commercial surrogacy are likely to increase. Perhaps unsurprisingly, this has led to the emergence of intermediaries and clinics with a clear financial interest. The reported case law illustrates two key points: relying on any statutory limitations on payments in the surrogacy process dependent entirely on preventing intending couples from obtaining parental status for the child does not and cannot succeed. Once a child is settled with the intending parents and attached to them, the child's best interests will inevitably be a family court judge's priority; and undefined expenses can 'disguise' an almost limitless and improvable range of payments. It should perhaps also be noted that it is not reasonable in any jurisdiction to expect courts *post facto* to develop regulation of surrogacy practice when a national parliament has not done so itself.

Fifth, it is a common position across the research legal systems that legal parenthood and nationality do not follow automatically from the surrogacy 'contract'. Irrespective of what any 'contract' may provide or suggest, this means that the couple (person) that arranges for surrogacy will not acquire in most states parental status at birth notwithstanding the fact that the child may be genetically related to them. Except perhaps in India and California, it is the general position across the research jurisdictions that the surrogate is under no obligation to surrender the child. It can thus be concluded that intending parents cannot legally enter into binding and enforceable contracts concerning the status of legal parenthood if such arrangements deviate from mandatory statutory provisions; even in California and India, state participation and assessment is required albeit to varying degrees. This does not mean that surrogacy contracts are without meaning. For instance, the written agreement can give the parties as well as any court supportive evidence about the intentions of the parties involved at the time the agreement was drawn up and thus may assist a court or national authority with drawing inferences as to any relevant determination relating to the surrogacy arrangement. The agreement may also clarify the payments and expenses in connection with the surrogacy process.⁶ Equally, drawing up an agreement may help all the parties involved envisage the consequences of the process that they are embarking upon.

Sixth, in the states that have adopted specific legal provisions regulating surrogacy and facilitating the transfer of parental status to intending parents, two models are opposed. The *ex ante* framework for surrogacy in California and its impact on parenthood is in sharp contrast with the *ex post facto* mechanism for transferring parenthood following the child's birth, to which UK law in this field is confined. Therefore, the UK and California have applied two different models for regulating surrogacy and the mechanisms to register

6 In the UK, the surrogacy agreement is often reviewed as part of the application for a parental order as part of the determination as to whether reasonable expenses have been paid.

the child's legal relationship with the intending parents. The following aspects remain unclear: (i) the role genetics plays with respect to parentage laws; (ii) whether the recognition of a foreign judgment or birth certificate upon which the birth mother is not recorded is to be regarded as contrary to public policy; (iii) whether an original foreign birth certificate upon which two parents are recorded, both of whom are not genetically related to the child, should be regarded as contrary to public policy; and (iv) the method of recording and the timing of the consent of the surrogate and whether consent needs to be given pre-conception and post-delivery.

Seventh, the appropriateness of assessing the suitability of intending parents in respect of their ability to parent a child not yet conceived is an issue for all assisted reproduction technologies and not just surrogacy. The appropriate degree of assessment, if any, is a complex question. If the involvement of a third party is what makes the difference, should those conceiving with the aid of a surrogate be treated differently than parents conceiving with sperm and ova donors? When adopting a human rights-based approach, it is important that restrictions on a parent's eligibility are not arbitrarily imposed and are free of discrimination. There are, however, necessary limits. The conclusions reached in Chapter Four are insightful in this context. The policy priority through any state assessment of the surrogacy process and arrangements may therefore be to help ensure fair practices and reduce the risk, at each and every stage, of exploitation of women who act as surrogates, as well as the children who are born from surrogacy agreements. Attention must be given to each of the parties who may profit from surrogacy, such as surrogacy agencies, medical professionals, and legal practitioners.

What appears to be common ground in the research legal systems (except perhaps in France and Switzerland) is that surrogacy should be regulated in some form.⁷ The UK creates a special public body, and the Netherlands and Belgium all assign the power to investigate a case to the child protection authorities.⁸ In addition to draft legislative proposals (e.g. in Belgium, India, and the Netherlands), some states have begun to establish minimum standards for surrogacy arrangements. These include (a) an assessment of intending parents and surrogates prior to any course of treatment being commenced (e.g. the Netherlands) or as part of a post-birth transfer of parenthood (e.g. the UK); (b) a

7 In Belgium, for example, a number of alternative legislative proposals on surrogacy have been introduced since early 2012; in the Netherlands, there is a call for legislative action; in India, draft legislative proposals are pending before the legislature.

8 In the case of the Netherlands, if the intending parents have taken on the care and upbringing of the child concerned, they must report this to the executive of the municipality in which the child is resident (Section 5 of the Foster Children Act). If the intended parents wish to adopt a child under six months of age who was born to a surrogate mother, they require prior written consent from the Child Protection Board. Failure to obtain this consent is a criminal offence (Article 442a of the Criminal Code; Article 151a of the Criminal Code). Furthermore, in such a case, the Child Protection Board may ask the court order to appoint a temporary guardian for the child (*voorlopige voogdij*) (Book 1, Article 1:241 DCC). See CRC/C/OPSC/NLD/Q/1/Add.1, 7-8.

requirement intending parents and the surrogates to commit to and engage in a course of counselling throughout the conception and pregnancy process (e.g. Belgium); (c) the establishment of medical, legal, and other professional bodies to set best practice provisions (e.g. the Netherlands); and (d) a framework to establish the surrogate's free and unconditional consent (e.g. the UK). These standards perhaps provide a starting point and a framework for the creation of internationally recognised minimum standards. However, in many surrogacy-friendly jurisdictions, control mechanisms are either non-existent (at least not publicly known) or are not as rigorous as they should be, and there is often a strong financial motivation for intending couples to use such jurisdictions for their surrogacy arrangements. This, in turn, raises a worrying development which is the use of what might be termed 'DIY surrogacy' arrangements, which are established largely through the Internet. These arrangements remain entirely unregulated, are often illegal, and are fraught with difficulties.

Eighth, states have an obligation under international human rights law to avoid the statelessness of a child born through a surrogacy arrangement. The impact of inter-country surrogacy matters on nationality law requires further attention, particularly the statutory definition of 'parent' for the purposes of nationality law and the identification and analysis of statelessness situations. In a number of states, judicial or administrative authorities have attempted to create at least partial remedies to enable a child born from an international surrogacy arrangement to enter the home state of the intending parent(s) (e.g. in the Netherlands and France, which has often resulted in a discretionary application of immigration rules). These remedies have been applied often in the context of non-contested surrogacy matters but at the expense of any express statutory footing.

There are further reasons for all states to consider the application of immigration law in the context of inter-country surrogacy. A system would need to be developed to enable for the grant of a visa and/or discretionary travel document (issued within a reasonable timeframe) to enable these children to enter the home state of the intending parents to address their status until orders are granted or parentage determined. A summary of the findings in the context of nationality and the prevention of statelessness together with recommendations is set out in Chapter Five at 5.6.

Lastly, aside from the recorded parental order applications in the UK, no statistical data are available with respect to the number of surrogacies in each of the research jurisdictions. The absence of data is not a new finding but one that remains essential. There may in fact be more surrogacies which national authorities are not aware of: those where the intending parent(s) do not/cannot apply for a parental order, if available (either because they do not appreciate the need to do so or because they do not meet the eligibility criteria), or those who do not report the birth of the child(ren) as a result of surrogacy (because the surrogacy is hidden from the authorities or because formal adoption takes place in order to affect the *ex post facto* transfer of legal parenthood). Whilst the possibility of inter-

country adoption may exist in certain circumstances, as discussed in Chapter Four, the appropriateness of this route is highly questionable particularly where the state of residence of the intending parents makes it a criminal offence for intending parents to apply for adoption. The international framework of inter-country adoption should not be undermined by cases of inter-country surrogacy.

It has been concluded that the national laws in the research jurisdictions on parenthood and the establishment of nationality at birth provide varying degrees of protection with respect to the interests of the surrogate-born child and, more broadly, the parties to the surrogacy arrangement. Even the regulatory frameworks in the UK and California and the proposed framework in India have identifiable shortcomings when assessed in conformity with international human rights law and when considered in light of the realities of market practices in this field. The focus of this research is thus to consider appropriate legal regulation in response to inter-country surrogacy. The question yet to be answered is: What type of action is needed to protect the rights of these children in conformity with European and international human rights law and who should act (i.e. at the national, regional, or global level)?

6.2 DOMESTIC ACTION

The realities of reproductive travel and the effects of inter-country surrogacy cannot be ignored. It therefore falls on each state to, on the one hand, determine whether or not surrogacy should be permitted within its territory and, if so, on what basis and with what consequences and, on the other, to consider the effects of inter-country surrogacy arrangements on its legal order. A national response must be understood against the backdrop of the human rights parameters considered in Chapters Four and Five. An examination of children's rights in inter-country surrogacy has revealed that, in theory, regulation will address many of the potential violations of the rights of the child and others.

Surrogacy is not, however, the only contemporary issue relevant to a discussion on legal parentage; others include laws concerning the establishment and contestation of legal paternity (often outside marriage), the legal parenthood of social parents, ART⁹, and same-sex parenting.¹⁰ Surrogacy needs to be understood in the context of scientific and societal

9 In the coming years, scientific advancements in reproductive technologies, such as somatic cell nuclear transfer and stem cell technology, will challenge traditional parentage models in new ways. For instance, these advanced technologies could allow two women to create a child without any male genetic contribution or six parents to all contribute genetically to the creation of a child (N. Phillips, 'Scientists Grow Embryos from Three Adults', *The Sydney Morning Herald* 25 October 2012, available at: <www.smh.com.au/technology/sci-tech/scientistsgrow-embryos-from-three-adults-20121025-286fv.html>).

10 E.g. on the validity, in a same-sex married couple, of the adoption by a woman of a child born to her wife resulting from a medically assisted procreation procedure abroad (Opinion of the French Court of Cassation,

developments which have led to a changed reality in which, in certain circumstances, persons can intend to become a legal parent, irrespective of whether they have a genetic connection with the child to be born. In the midst of these developments is the child, whose best interests should be the primary consideration when legal matters affecting the child are at stake. Nature or genetics can no longer be used as the exclusive normative source for rules concerning the establishment of legal parenthood. A need to re-evaluate the fundamentals of the law on parenthood emerges if the child's interests are to be protected.

In the field of surrogacy, lawmakers must decide how far to extend parentage and parental responsibilities arising pre-birth, at birth, soon after birth, or long after birth to those who are the intending parents and how the application of the law on parenthood interacts with nationality and immigration law and child protection practices. States must develop a human rights-based response to the legal dilemmas that arise when their nationals arrive at the border or a national authority with a child of uncertain parentage and nationality: ambivalence and blanket prohibitions are not solutions.

A number of recommendations based on the findings now follow. The recommendations set out below, ranging from a national review to multilateral responses, are not mutually exclusive and should be considered in parallel.

6.2.1 *National review*

The findings of the comparative review and the assessment of the surrogate-born child's rights in Chapters Four and Five suggest that the risks of not having a regulatory framework are greater than the risks suggested by introducing one. The case reviews show the urgency of the issues. Considered in that light, the obligations of international human rights law require national consideration, most likely with legislative action. It is suggested that there is a need to look at legislative debates and grassroots campaigns, studies, and other writings to lead to an enhanced understanding of the issue(s).

Any national commission working on surrogacy (and parentage in the context of ART, more broadly) should consist of a broad-based group of specialists (including experts with in-depth knowledge of children's law, family law, international human rights and criminal law, as well as medical experts and ethicists).¹¹

²² September 2014, Avis n°15010 and 15011, available at: <www.courdecassation.fr/jurisprudence_2/avis_cour_15/integralite_avis_classes_annees_239/2014_6164/22_septembre_2014_1470006_6868/>.

¹¹ As discussed in Chapter Three at 3.7, the Dutch Government has set up a commission to review the law of parenthood.

Any national review should consider, *inter alia*:

- i. The regulation of surrogacy and make recommendations in conformity with international human rights law about resulting amendments to national law concerning parenthood, birth registration (and birth records), nationality, the transfer of children across borders, and other legislations as required. If surrogacy is to be regulated internally or the effects of inter-country surrogacy recognised, consideration should be given to, for example, (a) the conditions placed on access to surrogacy, (b) who may perform/participate in the process, and (c) subject to what oversight.
- ii. More active monitoring of processes is clearly needed, especially to detect fraud, improper gain, lack of true consent, and false claims of abandonment or adoption. A troubling lack of transparency in the process has been noted generally in inter-country surrogacy. Transparency is one of the best protections against misuse and exploitation of each of the parties to a surrogacy arrangement as it enables to see what protections are in place and identify where actual or potential abuse may occur.
- iii. Whether any existing civil and/or criminal sanctions are effective and feasible to promote the national policy. Attention should be given, for example, to ensuring the lawful transfer of children across borders and anti-trafficking measures.¹² Criminal law allows prosecution of practitioners of unlawful acts, but these acts first need to be clearly defined. Serious violations should be investigated, and penalties should be enforced to end any impunity for those who benefit from the criminal exploitation of their fellow human beings.
- iv. The framework to promote the rights of the child and the international human rights standards identified in Chapter Four (to include consideration of the meaning given to a surrogate-born child's right to an identity, right to information about his or her origins (and related donor anonymity concerns), and right to a nationality) and how to frame child protection policy to ensure that these rights are best protected.
- v. The consequences of surrogacy in other policy areas, such as parental or family leave policies¹³, health insurance and pension arrangements.
- vi. The need for reliable, comprehensive, and comparable statistics to provide visibility of the scale and impact of the multiple issues.

If surrogacy is accepted as an accepted option for family formation, states should consider whether it should be possible for intending parents to undertake the practice domestically.

This is not to ignore that any national review is likely to be dependent upon political will or to suggest that legal rules can by themselves enhance a child protection policy. If

¹² See Chapter Four at 4.9.

¹³ See the discussion in Chapter Four at 4.14.2.

children's rights are to be taken seriously, there must be more than legal reform; societal reform must be coupled with education.

6.2.2 *Type of surrogacy arrangements*

The question of fees and the (potential for) associated abuses are, as has been discussed, very relevant in the context of most cases of (inter-country) surrogacy. Even in jurisdictions which regulate surrogacy, such as the UK, it appears that the scale of fees and charges is unknown or potentially limitless in, for example, California. It has also been considered that intending parents can be considered as victims of the lack of regulation of the financial aspects of inter-country surrogacy; they are specifically victims when, acting in good faith, they are not aware of the abuses behind the birth of the child (e.g. where the surrogate has been trafficked). Yet even purportedly altruistic models for surrogacy regulation can be seen to have their pitfalls, as discussed above. The UK experience exemplifies this. If an altruistic model is to be implemented, clarity about what expenses are and are not included within the notion of altruism is essential. This does not mean that prohibition of surrogacy is the solution, but instead it leads to the realisation that an effective and clear framework is needed to endorse the policy adopted. Indeed, as discussed in Chapter Four, the standards identified under international human rights law requires States Parties to the Palermo Protocol and the CRC Optional Protocol on the Sale of Children and more generally the CRC to provide concrete measures to satisfy the protections set out therein.¹⁴

Any national policy choice requires a discussion of what constitutes a 'commercial arrangement' amounting to a 'sale' and how to ensure transparency in the arrangements made. Is it the element of profit-making that should render the arrangement unacceptable? And, if so, to whom: the surrogate or third party intermediaries? Different perspectives may be brought to whether the following examples are 'reasonable expenses': compensation for lost opportunity to engage in paid work, child care for the surrogate's own children, travel costs during the pregnancy, and relationship counselling for the surrogate and between the surrogate and her partner.

It has been observed that commercial surrogacy without state oversight of the financial aspects is particularly problematic if assessed against existing European and international human rights standards. However, in a framework where surrogacy is supported through regulations and laws, the general objections to surrogacy such as possible harm to women and children and the risks of exploitation can be addressed.

¹⁴ See the discussion in Chapter Four at 4.9.

6.2.3 *Determination of legal parenthood*

Aside from the *a priori* question of whether to permit or tolerate surrogacy and, if so, in which forms and under which (if any) regulatory system, it has been concluded that many (if not most) legal systems need to respond to the question of the legal parentage of, and parental responsibilities with respect to, surrogate-born children (and, it is suggested, more broadly via ART¹⁵) to comply with their obligations under international human rights law to respect and protect the rights of the child. Parenthood goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being.¹⁶ It is central to a child's being, whether as an individual or as a member of his family. Fundamental as these matters must be to the surrogate and the intending parents, they are even more fundamental to the child. On the basis that the child has a right to parents and that the rights of the other protagonists in the surrogacy process are also important but that they must nevertheless defer to the needs and interests of the child, the law of parenthood needs to protect and realise the child's welfare.¹⁷ It is also in the interests of other parties, not least the state, to have certainty in relation to their civil status.

The need for certainty with respect to the determination of parenthood and the recognition of that determination worldwide (essential in the context of civil status and nationality and intimately connected to the child's right to an identity) requires consideration of the law of parenthood. Returning to the discussion in Chapter Three and the contrasting approaches presented, attention turns to consider alternative ways in which legal parentage in the context of surrogacy can be established at the time of the child's birth or shortly thereafter.¹⁸

Three general but important comments must be made. First, any regime must treat both intending parents equally free of discrimination and not privilege male (genetic) parents at the expense of female parents. Second, any solution should also treat domestic and inter-country arrangements with parity and provide safeguards and consistent protec-

15 It would seem sensible that there be consistency in the regulation of ART and surrogacy practices as the policy considerations are similar: the rights and interests of child(ren), the reproductive freedom – of persons wishing to use ART and the limitations to this freedom – the role the state should play in the provision of ART, and, in some cases, the risks of reproductive tourism and/or the commodification of children and reproductive abilities. However, how these issues are addressed in law or policy across states (if at all) varies considerably depending upon the social and cultural context.

16 *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam), para. 54.

17 See the discussion in Chapter Four at 4.15.

18 See K. Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' [2010] 22(4) Child and Family Law Quarterly 449. For a discussion of the alternative approaches (statutory rules and presumptions) in the legislative context of Sweden, see the work of J. Stoll, 'Surrogacy Arrangements and Legal Parenthood. Swedish Law in a Comparative Context' (Dissertation, Uppsala University 2013).

tions to all parties. Third, regimes should also accommodate arrangements if intending parents wish to establish (regularise) parental status for existing surrogate-born children.¹⁹

(a) Creation of new statutory law or presumptions

It was discussed in Chapter Three that one way for a jurisdiction to produce certainty in terms of parenthood following surrogacy arrangements is to establish parenthood by operation of law.²⁰

It has been considered that the greatest source of uncertainty for the intending parents following surrogacy arrangements concerns maternal uncertainty as well as uncertainty for the second parent or, in minor cases, the non-genetic intending father. This uncertainty has arisen principally in terms of maternity as a result of advances in reproductive technologies which have made it possible to separate gestation and genetics.

A decision about what makes a (legal) mother must be made if a state is to meet its obligations to the surrogate-born child. The child needs parents who are given parental responsibility for the child at the child's birth. One of the alternatives that could promote greater certainty, even in the absence of express surrogacy regulation, is to codify the *mater semper certa est* principle and make it into a statutory rule of law in favour of the surrogate. This assumes a policy that favours the gestational mother as the child's legal mother at the time of the child's birth. Applied to surrogacy, it would at the time of the surrogate-born child's birth provide certainty as to the legal status of the various 'mothers'. This, in turn, would guarantee that the surrogate-born child has at least one legal parent at that time. It was seen in Chapter Three that this approach has been adopted in the UK; the UK's HFEA 2008 clarifies the position of the surrogate as legal mother. This provision reinforces the policy that the gestational mother in any jurisdiction is the legal mother. However, there may be a significant period of time in the child's life where the intending parents who, on a day-to-day basis, are caring for the child are not recognised as being the child's legal parents. Another concern is that the surrogate may not wish to raise the child if the intending parent or parents were to change their mind and refuse to take the child. Adoption or fostering would remain as alternative placements for these children.

An alternative approach is to assign parentage so as to recognise those who provided the gametes. In addition to the intending mother, this could also include the partner in a same-sex female relationship or any third-party donor. A statutory rule of maternity based on genetics would have the advantage of providing certainty for the intending mother. This approach could, however, lead to an egg donor being considered as the legal mother,

¹⁹ E.g. not limiting it to six months from the date of birth as the UK statutory regime does.

²⁰ See also the recommendations set out in the HCCH study, 'The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project' Prel. Doc. No 3 B of April 2014 (and the HCCH's earlier studies).

and it would be difficult to determine at which point the legal motherhood of the intending mother commenced.

As a third alternative, maternity could be based on intention. That 'intention' could operate as a prebirth determinant in 'awarding' parental status when a child is born following surrogacy. Recognising intention would mean that creating families by surrogacy or, more broadly, as a result of MAR would not cause differential treatment (in terms of how parental status is achieved) and nor would surrogacy be treated as 'inferior' to other assisted reproductive techniques. As Horsey writes, there are pragmatic reasons *'for acknowledging parenthood before conception, centred upon a need for certainty and uniformity: intending parents would understand from the outset that they will be presumed legal parents and are therefore responsible for the child's well-being'*.²¹ Although in numerous surrogacy arrangements the genetic parents are also the intending parents, this cannot be assumed. In many cases, only one intending parent will have a genetic link to the child. A statutory rule of maternity based on intention (as adopted in California) would have a similar effect, and similar disadvantages, as the rule based on genetics.

Unlike the question of motherhood, there is no comparable division between genetics and gestation for fatherhood. A possible alternative to implementing a general rule of paternity based on genetics would be to create a legislative presumption that would apply only to establishing fatherhood following surrogacy. This could be achieved by inserting into national law a provision which provides that the intending father (and not a third-party sperm donor) who contributes his genetic material (at a licensed fertility clinic) for the purpose of a surrogacy arrangement is presumed to be the legal father of the surrogate-born child. A legislative rule of paternity based on genetics would make it possible for parentage to be confirmed at the time of or following the child's birth, or earlier. This option for resolving paternity following surrogacy arrangements, however, might appear redundant, mindful that most current rules on parenthood usually permit a genetic father to assert paternity based on his genetic connection to a child at or following birth. Even so, if the objective is to ensure that the first legal father following surrogacy is the intending father, a presumption of paternity based on genetics would confirm the intending father's position as legal father by prioritising it over, for example, the surrogate's husband or partner.

A statutory presumption of paternity based on intention could also be considered. This option for determining paternity following surrogacy would involve the creation of a mirror provision of any intention-based presumption of maternity. Broadly speaking, the effect of this would be that the intending father would be the legal father of the child. The

21 K. Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' [2010] 22(4) Child and Family Law Quarterly 449.

intending father, in the same way as the intending mother, could thus be afforded equal treatment in terms of legal parenthood from the time of the surrogate child's birth.

Statutory rules (free of discrimination) of parenthood for same-sex couples would also need to be considered.

Establishing legislative rules, or statutory presumptions, of maternity, paternity, and parenthood in the interest of (inter-country) surrogacy arrangements would foster greater certainty for all parties following surrogacy. Thus, it could be an important first step in the protection of the various interests, not least the rights of the child.

(b) A need for specific PIL rules on parentage

If a national framework is to be adopted, the effects of inter-country surrogacy on the determination of parenthood require clarification, such as rules on jurisdiction to make decisions as to legal parentage; the legal effects of surrogacy, including in particular whether applicable law conflict rules need to be framed to determine legal parentage and the legal effects thereof; and the recognition and enforcement of foreign judgments on parentage and authentic instruments relating to surrogacy abroad.

Jurisdiction could be based upon (i) the habitual residence²² of the intending parents; (ii) the presence of the child, where the child's habitual residence is uncertain; (iii) discretionary transfer to a more appropriate court; or (iv) physical presence of the child.

Conflict rules relevant to the determination of parentage should also be considered, not least to minimise the risk of limping civil status relationships.²³ In very few of the research jurisdictions that have legislated to regulate surrogacy are there national conflict of law rules to deal in a systematic way with inter-country surrogacy.

What has appeared more pressing is the need to consider the scope of the rules of recognition of foreign parental statuses. Given the importance of public policy in this area, the meaning to ascribe to public policy necessitates clarification.²⁴ The answer to the question whether or not the family relationship is to be recognised in the home state of the intending parent(s) should be considered in the light of the child's best interests (and the rights of the child, more generally) and, at a minimum, should be answered in the affirmative if the informed consent of the surrogate is confirmed and the child is genetically

22 This is the primary connecting factor in the Hague Children's Conventions. Beaumont and Trimmings write that 'Habitual residence should be chosen over nationality or residence. This is, first, to ensure that the authorities of the intended parents' home State and the State of birth respectively have sufficient information to assess accurately the suitability of the prospective parents and the surrogate mother'. See K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 28, 538.

23 The English law approach is worth repeating as it aims to provide consistency and promote the national policy such that English law is always applied to determine parentage regardless of where the child was conceived or born.

24 See the discussion in Chapter Three at 3.14.6.

the son or daughter of an intending parent or if, in the context of the Contracting States to the ECHR, family life between the child and the intending parent is established. Recognition should therefore be enabled upon fulfilment of cumulative requirements. Certain parallels can be drawn with the situation in inter-country adoption, and assistance could be derived from the approach in Chapter V of the 1993 Hague Adoption Convention. In this respect, it might be that Article 26 of that Convention could provide some inspiration in that any future law might provide some minimum legal effects which would derive from the recognition of legal parentage.

(c) Transfer of parenthood provisions

If an intending parent has no legal parental status in relation to the surrogate-born child, some form of mechanism to establish legal parentage will be necessary in order to protect all of the interests in question. Two ways in which legal parental status could be conferred on intending parents are explored: pre-birth parental order and post-birth parental order. The prebirth approval of the surrogacy arrangement is the model used in California; it does not require a transfer of parentage after the child's birth. A post-birth parental order (which is practised in the UK) has a transformative effect.

Certain criteria must be fulfilled by the intending parents in order either for preapproval of the arrangement to be obtained or for legal parentage to be established *ex post facto* (depending upon the approach adopted). These include, for example:

- i. Eligibility for intending parent(s) – In several states, if a couple is undertaking a surrogacy arrangement, they must be either married or in a marriage-like relationship (defined in various ways) or an enduring relationship. In some states, this is defined without reference to whether the two intending parents are of the same sex or not. As with ART treatment generally, age requirements are also often placed on intending parents, as are health requirements (i.e. usually an inability to carry a pregnancy to term), and, in some states, psychosocial criteria must be fulfilled.
- ii. Eligibility of the surrogate – Age, health, and psychosocial restrictions (usually having undertaken counselling) are also common criteria for women wishing to become surrogate mothers. In some states, a further condition was that the woman had already had at least one healthy pregnancy of her own.
- iii. Genetics – A genetic connection with one or both intending parents and the child (except in exceptional cases²⁵).
- iv. Informed and continued consent – The informed consent of the surrogate pre-conception and post-birth and the recording of that consent evidenced in writing.
- v. Gamete providers – The record of the identity of gamete providers.

25 While perhaps unusual, there may be exceptional circumstances such as a family donor arrangement where there is nonetheless an established family relationship which distinguishes this from inter-country adoption.

A parental order could be a model not only for transferring parenthood following national surrogacy arrangements but also for transferring parenthood surrogacy arrangements.

In either case, a parental order serves to protect the lifelong welfare of these children by: (a) conferring joint and equal legal parenthood upon both intending parents, thereby ensuring the children's security as lifelong members of the intending parents' family; (b) extinguishing the residual parental status of the surrogate (under the law of the home state of the intending parents); and (c) ensuring that the children have inheritance rights as members of the intending parents' families. In addition, a parental order would enable the intending parents to appoint guardians to care for the children in the event of their deaths.²⁶ All of these facts are fundamental to these children's existence and identity.

(i) *Pre-birth parental order*

A pre-birth model has been chosen by California which implements a statutory presumption of parenthood based on the prebirth judicial approval of the surrogacy arrangement. The Californian model for determining the legal parental status of the intending parents does not require any transfer of parentage from the surrogate mother. Instead, parentage rests on a statutory presumption of parenthood in favour of the intending parents that establishes legal parental status from the moment of birth, provided that court approval for the surrogacy had been sought and granted before the surrogate delivers the child.²⁷ This response to parenthood gives the intending parents legal parental status from the moment of birth. It also eliminates the need for any form of parental transfer after the child is born.

From the perspective of the intending parents, there are clear advantages of a presumption in favour of the intending parents based on prebirth judicial approval of surrogacy. This approach creates a high degree of certainty in relation to their future legal parental status from the moment the surrogacy arrangement is approved by the court. This certainty is likely to be an advantage for the surrogate (and her spouse), for the child, and for the state.

The involvement of the state in approving the process could also be seen as an advantage of the Californian model since there is an opportunity to ensure that the best interests of the prospective child and the circumstances of the surrogacy arrangements are considered before the birth. Yet the problem areas with this approach are connected in practice to the absence of any known administrative monitoring of the parties before and after the surrogacy treatment commences and after the judicial order is handed down.²⁸ From the per-

²⁶ E.g. in the UK, section 5(3) Children Act 1989.

²⁷ See K. Rokas, 'National Report on Greece' in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 9.

²⁸ Note, however, that under section 3030 of the Family Code, absent the Court's finding that there is no significant risk to the child, the Court will not award physical or legal custody of a child born through a surrogacy arrangement to an intended parent that has been convicted of a crime with a sexual component such that

spective of the surrogate-born child, the model also has a weakness because there is no capacity to re-evaluate the arrangement in light of the various interests, particularly the ongoing consent of the surrogate and the interests of the child, if the situation changes during the pregnancy or at birth. The focus is, rather, on the intention and interests of the parties at the time the judicial order is handed down.

(ii) *Post-birth parental order*

A possible alternative would be to consider a post-birth model. It will be recalled from Chapter Three that a statutory-based model for the transfer of parenthood following surrogacy has been implemented in the UK. This model permits parenthood to be transferred to the intending parents after the birth of the surrogate-born child through court order in certain specified situations without the need for adoption. In the UK, the term ‘parental order’ is used to describe the court order. The intending parents become the legal parents after the parental order is awarded by the court.

Several other factors relevant to parentage should also be considered before implementing a parental order model or deciding whether the parental order would be suitable for implementation. These include exploring the possible requirements that should be placed on the applicants for a parental order; procedural safeguards for the intending parents, the child and the surrogate; and clarifying any specific rights that could or should be conferred on, for example, the surrogate, the intending parents and the child, in relation to parentage matters pending the issuance of a parental order such as parental or family leave. It is not uncommon in the UK for the parental order process to take anywhere from 6 to 12 months before a parental order is made. Thus there will be a significant period of time in the child’s life where the intending parents actually caring for the child are not recognised by UK law as being the child’s legal parents.

As to the surrogate, an issue that must be considered is whether to place restrictions on the selection of prospective surrogate mothers on the basis of age and/or their civil or marital status.

For the intending parents, there are a range of eligibility and substantive conditions to consider in relation to possible requirements and rights connected to parental orders, including whether to limit the scope of parents to whom a parental order may be awarded (e.g. individuals or couples, albeit without discrimination), whether a genetic connection between the intending parents (or one of the intending parents) and the child is required, and whether the intending parents need to be habitually resident or otherwise be connected (e.g. domicile or nationality) to the jurisdiction.

the intended parent is a registered sex offender or would be required to register as a sex offender under any state or federal law in the United States or an intended parent’s home country.

(iii) *The role of adoption*

A further solution to providing intending parents with legal parenthood could, with amendments to national law, be adoption.²⁹ Adoption, following surrogacy, could be granted by the court of the forum where a child is living, which would take the best interest of the child as the paramount objective and make sure that all other conditions provided for the applicable law are satisfied.³⁰ Although it has been clearly rejected in France,³¹ the courts in Italy,³² the Netherlands,³³ Québec,³⁴ New York,³⁵ and by some of the growing academic and research literature, some states have turned to adoption, albeit more frequently step- or second-parent adoption, as a solution to ensure that both intending parents benefit from the status of legal parent (with the ensuring parental responsibilities).³⁶

The primary objective of full adoption has been and should remain the satisfaction of the child's interests: to give the child parents who in turn provide the child with care, an upbringing, and a home. An important objective of full adoption is to place adoptive parents on an equal footing with the child's legal parents. That is to say, to ensure that the legal relationship existing between the adoptive parent or parents and the adopted child is judged in the same way as the relationship between the birth parents and their genetic children.

In many ways in practical terms either parental orders or adoption orders will resolve the children's legal position by ensuring their rights to inheritance, pension entitlement, financial support in the event of their parents' separation and all other basic entitlements which flow from them having a legal parent-child relationship. The orders are not the

29 The relationship between inter-country surrogacy and inter-country adoption is discussed in Chapter Four at 4.10.6.

30 This would most likely include, as frequently required by legal systems, the agreement of the parturient after the birth of the child or, where allowed by the applicable law, a court's order that the consent can be dispensed with, as well as an analysis of the suitability of the intended parents to adopt, taking into account matters beyond their will and financial ability to commission a child.

31 Cass. plén. 31 May 1991; CA Paris 1 February 2001, 327.

32 Corte di Appello di Salerno 25 February 1992, Nuova Giur. Civ. Comm. 1994 I 177, where a genetically unrelated woman was granted (based on Article 44 lett. b) Legge n. 184/1983) the adoption of her husband's child, given birth by an anonymous surrogate mother. According to the court, the fact that a surrogacy agreement was illegal as a matter of Italian law could not prevent it from granting the adoption where it was on the child's best interest.

33 Rechtbank 's-Gravenhage 10 December 2007 – 269480 – FA RK 06-4380, LJN: BC5651, available at: <<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BC5651>>.

34 E.g., Cour du Québec, Adoption – 09184, 2009 QCCQ 9058, [2009] Recueil De Case Law Du Québec 2694; Cour du Québec, Adoption – 09367, 2009 QCCQ 16815, available at: <<http://canlii.ca/t/29654>>; Cour du Québec, Adoption – 10330, 2010 QCCQ 17819, available at: <<http://canlii.ca/t/fkswr>>.

35 *In Matter of J.J.*, 2014 N.Y. Slip Op 24089.

36 A. Struycken, 'Surrogacy, a New Way to Become a Mother? A New PIL Issue' in K. Boele-Woelki *et al* (eds.) *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr*, (Schulthess Juristische 2010), 367.

same, however. Nor are they intended to be as a matter of law and public policy. Adoption certificates imply a change of family.

As discussed in Chapter Four, the position with respect to the application of the inter-country adoption rules as proscribed by the Hague Adoption Convention is problematic.³⁷ In an altruistic inter-country surrogacy, it might perhaps be possible to apply the Hague Adoption Convention procedures, but this could only be on the basis that if the terms of the surrogacy agreement and the requirements of the Convention are in conflict, the latter would take precedence. The Central Authorities would have to be involved; the usual procedures for establishing the adoptability of the child and the eligibility and suitability, including the exchange of reports, would need to be applied, and the entrustment of the child to the intending parents should not take place until the requirements of Article 17 have been met. The requirement of Article 4(b) (subsidiarity principle) would also have to be met; this could be the case if the authorities in the state of origin determine that placement with the intending parents is the only suitable arrangement in the particular case and that this would be in the best interests of the child.³⁸

In many states, it has been observed that step or second adoption is often the only (current) avenue through which an intending parent (usually the intending mother but also the intending co-parent in a same sex relationship) without legal parental status is able to become the legal parent of the child. Thus, if they are eligible to do so,³⁹ all intending female parents and intending male parents who are not genetically connected to the surrogate-born child usually have to apply to adopt the child if they wish to become legal parents. The requirements for adoption will vary depending on the state's national law. The second-parent adoption process makes it possible for an intending parent to apply to adopt his or her spouse's or, in certain states, the partner's child. A prerequisite is that the legal parentage of the non-adopting parent must already be established.

Applied to surrogacy arrangements, then, second parent adoption offers an approach to provide joint legal parentage for the intending parents. After all, should the intending mother or co-parent, just like any other eligible person, meet all the conditions set by the applicable law, then there would be no reason to deny the second parent the possibility of applying for adoption proceedings and, as the case may be, adopting the child. The fact that surrogacy has occurred should not, in itself, be enough to prevent an adoption of the child where the circumstances and the best interests of the child warrant the adoption.

It is important to reflect that parentage established by adoption usually entails legal consequences from the date of the adoption order and not from the date of birth of the child. In the context of surrogacy, the application of a step-parent adoption rules would

³⁷ As discussed in Chapter Four at 4.10.6, the application of the Hague Adoption Convention to surrogacy arrangements will often be impossible, if not inappropriate.

³⁸ See the discussion and recommendations in Chapter Four at 4.10.7.

³⁹ Same-sex couples or unmarried couples may, for example, not be eligible under domestic law.

therefore result in a disparity between the legal date of parenthood between the intending genetic father (arising at birth) and his spouse/partner (as at the date of the adoption order). It should be acknowledged that whilst adoption may be a route for an intending mother or second-parent to acquire legal parentage in some states, this may not be possible in those states with rules, which prohibit an adoption being granted where the prospective adoptive parents took part in a procurement which is unlawful or contrary to public policy.⁴⁰

6.2.4 *Unconditional and informed consent*

Irrespective of the method of determining legal parentage, the issue of the unconditional and informed consent of the surrogate (and her husband or partner if they are treated as a legal parent at the birth of the child) must not be ignored and the safeguards provided by international law respected in both the state of residence of the surrogate and the home state of the intending parents.⁴¹ In particular, clear rules are needed with respect to who must give consent, how it can be obtained and recorded, and when it can be dispensed with.⁴² Moreover, health information should be delivered in a way that ensures fully informed decision-making; respects dignity, autonomy, privacy, and confidentiality; and is sensitive to the needs and perspectives of surrogates.

Where all parties to a surrogacy arrangement consent to particular parenting arrangements in favour of the intending parents, and that consent is recorded, in the required legal form, and expressed or evidenced in writing, the court in the home state of the intending parents may more confidently find that it is in the best interests of the child to establish or recognise parentage. The method of recording and the timing of that consent (pre- and post-birth) is a key factor to minimise the potential for exploitation of a surrogate. In assessing evidence of the consent given by a surrogate (particularly where the surrogate is not available to give evidence in person), it is important for independent evidence (including, for example, from an appointed social worker or court officer) to be obtained of her views so that the court or national authority can be satisfied that her expressed consent is free and informed consent and free of coercion or violence (based on individual choice). Where best practice is not followed or evidence is incomplete, the court could also consider utilising an appointed officer to interview the surrogate, preferably in her

40 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' [2012] Preliminary Document No 10.

41 The approach of the UK offers an example (section 54(1) HFEA 2008). A court cannot grant a parental order unless the surrogate mother, who carried the child and any other person who is a parent of the child, has freely and with full understanding of what is involved agreed unconditionally to the making of the parental order. Such consent may be given only once the child has reached six weeks old. As discussed in Chapter Three, this consent can be inferred if the surrogate and the other parent at birth are not traceable.

42 See the discussion and recommendations in Chapter Four at 4.15.2.

language, e.g. through the use of audio or video conferencing facilities, if available. This is an area where stronger safeguards for the adult parties can lead to a greater protection for the child involved.

6.2.5 *Birth registration and records*

Even in the absence of surrogacy-specific regulation, the fact that surrogacy exists raises a number of issues regarding birth registration and associated birth records. In Chapter Four, it was concluded that surrogate-born children have a right to have an opportunity to know his or her origins; albeit it is acknowledged that such a right is not absolute.⁴³ This right forms part of a child's right to information about his or her origins to form his or her own identity. This right, whilst broadly recognised in theory, is slow to be implemented in practice. From the case law considered in Chapter Three, it appears that the realisation of the right of these children depends upon the wishes of the intending parents. As such, several factors should be considered such as the need to determine who should be registered as having a connection to the surrogate-born child and where on any national register this information should be recorded; the need to consider the significance of the role of a genetic or social connection to the surrogate-born child in comparison with a gestational connection; and if genetics is to be emphasised, or acknowledged, the need to decide whether the same principles should also apply when dealing with records following ova donation and sperm donation.

When taking into account the various ways to promote the right to information, it is impossible not to consider the importance of birth registration and recording the full birth history for a surrogate-born child. It is acknowledged that a more thorough analysis is required in relation to the sensitive issue of how personal information should be managed so that the interests of all parties can be protected whilst at the same time making the information easily accessible for the child. Nevertheless, states should consider what relevant, prescribed information about donors, parents, and donor offspring should be recorded. Mirroring in many ways the procedure with respect to adoption, the UK offers an example of a possible approach in the context of surrogacy.⁴⁴

6.2.6 *Nationality and immigration status*

As considered in Chapter Five, nationality legislation may often assume that the genetic and legal parent of a child will be one and the same person, causing difficulties where this

⁴³ See the discussion and recommendations in Chapter Four at 4.15.5.

⁴⁴ See the review in Chapter Three at 3.5

is not the case. Moreover, even if nationality legislation provides a clear definition of who is considered to be a 'parent' for nationality purposes, it has been established that this may not necessarily mirror the rules concerning the establishment of legal parentage in the context of surrogacy, with the result that there is a very real possibility that a child has a legal parent according to the law of one state but not nationality. This is also, of course, a possibility in those states in which a genetic connection must be present for the child to acquire nationality by descent from a parent. The timing of the determination may leave these children with a questionable nationality status with resulting immigration difficulties.

Recommendations to respond to nationality issues and the prevention of statelessness are set out in Chapter Five at 5.6. In summary, it is submitted that if the home state of the intending parent(s) recognise(s) the parent-child family relationship between the child and the intending parent(s) established in the country of the surrogate, the child should have access to the nationality of the intending parent(s) under the same conditions as a child born to the intending parent(s).⁴⁵ The answer to the question whether or not the family relationship is established or recognised should be considered in the light of the child's best interests (and the rights of the child, more generally) and should be answered in the affirmative if the child is genetically the son or daughter of one of the intending parents. In the event that the home state of the intending parents is unwilling or unable to confer citizenship, the burden falls to the country of birth to ensure that the child does not remain stateless. The following position could be adopted (with consequential amendments to the state of birth's nationality laws): a state shall grant its citizenship at birth to a child born on its territory in cases where the parents are unknown or who do not have that state's citizenship, and the child would otherwise be stateless.⁴⁶ This is likely to require changes to the current legislative framework (consistent with the law of parentage) and, with the provision of resources, the regulatory practices of policing and immigration officials.

6.3 INTERNATIONAL ACTION

In addition to domestic action, it has been observed throughout this thesis that surrogacy is a global phenomenon. Given the more problematic nature of international surrogacy,

⁴⁵ Mirroring the common approach in cases of inter-country adoption. Notably, in connection with citizenship, with regard to the acquisition of citizenship through inter-country adoption, the clear trend among States Parties to the Hague Inter-country Adoption Convention is in favour of according automatically to the adopted child the nationality of the receiving state, provided that the adopter or one of them has the nationality of that state. Discussed further in Chapter Five.

⁴⁶ N. Lowe makes this recommendation in his paper to the Council of Europe on the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation (CJ-FA (2008) 5). See Council of Europe Recommendation CM/Rec (2009) 13. See Chapter Four at 4.11.

a normative framework for domestic surrogacy cannot be readily translated into international arrangements; global solutions are necessary. As Boele-Woelki has written: '*In the interest of children born through surrogacy international cooperation is needed now!*'⁴⁷

International responses to inter-country surrogacy might include (i) bilateral cooperation, (ii) multilateral cooperation (a single or multi-issue instrument), and (iii) soft-law instruments such as establishing minimum standards and common principles to assist states with framing and reviewing national policies to surrogacy (again, a single or multi-issue instrument). These responses are considered below. In this part, specific attention is given to developing the work to date of the Permanent Bureau of the Hague Conference on Private International Law and to considering the framework instrument set out in the study conducted by Beaumont and Trimmings.⁴⁸

In order to assess the suitability and desirability of any response, it is not a simple exercise to identify a particular kind of instrument (convention, recommendation, or common principles) which should be selected and proposed. Equally, the choice of forum or international body (regional or international) also needs to be assessed. The sensitivity of the issues at stake, the political climate, and the presence of actors who might support or oppose a standard-setting initiative will all influence those choices. Nevertheless, some general principles as to suitability of the way forward can be suggested. As considered in Chapter Four, 'normative gaps' are perhaps best addressed by 'hard-law' instruments.⁴⁹ In particular, in the presence of a gap in protection that puts in jeopardy the human integrity of children, a legally binding standard is the best response to include legally binding monitoring and enforcement mechanisms. However, a 'soft-law'⁵⁰ instrument may be the more realistic option when a significant number of states seemingly do not have an enhanced understanding of the issues and have reservations with respect to the subject matter. A soft-law instrument may also be adopted as a first step to prepare the way for a legally binding instrument.

47 K. Boele-Woelki, 'Cross-Border Surrogate Motherhood: We Need to take Action now!' in *A Commitment to Private International Law: Essays in Honour of Hans van Loon / Permanent Bureau of the Hague Conference on Private International Law* (Intersentia 2013), 58.

48 Others have also called for a multilateral response, e.g. M. Engel, 'Cross-Border Surrogacy: Time for a Convention?' in K. Boele-Woelki, N. Dethloff *et al.* (eds.) *Family Law and Culture in Europe: Developments, Challenges and Opportunities; Proceedings of the Fifth Conference of the Commission on European Family Law* (Intersentia 2014); the conclusions of the EU Research Study.

49 In this context, see the practical comments of the International Council on Human Rights Policy 'Human Rights Standards: Learning from Experience' [2006] available at: <www.ichrp.org/files/reports/31/120b_report_en.pdf>.

50 Soft law does not impose legal obligations on states, and such sources must be used carefully in order to ensure that their legal weight is not overestimated or otherwise distorted.

6.3.1 *Bilateral cooperation*

In cases of inter-country surrogacy, one approach is to leave it to individual states to find solutions to facilitating cross-border cooperation between countries with particular reference to issues such as parental status and the determination of the nationality of the child. This could be based informally on exchange of letters or a memorandum of understanding or more formally by way of a bilateral treaty.⁵¹

In particular, it is not unreasonable to suggest that surrogacy-friendly states (e.g. the USA, Ukraine, Mexico, India) in particular should explore and agree tools of cooperation to ensure that a surrogate-born child is not left with 'limping' legal parentage or stateless, with the consequent child protection steps that cooperation should involve, and, in other areas, such as mutual legal assistance in protecting and realising the right of each of the parties to the surrogacy agreement. This could include, for example, agreed guidelines in ensuring the informed and continuing consent of the surrogate in the required legal form, and expressed or evidenced in writing, and appropriate due diligence of agencies and intermediaries. An important question, however, is whether bilateral responses are the best level to deal with problems that arise out of a divergence of national systems, approaches to surrogacy, and the growing surrogacy market. It is arguably more comprehensive to deal with these issues at a multilateral global level.

6.3.2 *Multilateral cooperation*

(a) **A multilateral convention**

The framework proposed by Trimmings and Beaumont calls for an international convention of inter-country surrogacy arrangements. Whilst the proposal calls for flexibility for the scope of regulation at the national level to be decided by each state, several recommendations are proffered, including reliance on the 'best interests of the child' standard, the requirement of a genetic connection between at least one of the intending parents and the child, and prior evaluation and assessment of the parental fitness of the intending parents. With respect to the latter criterion, it has been discussed in Chapter Four in 4.15 that any assessment of the intending parents must be proportionate with the aim of promoting transparency in the arrangements. If the intending parents are considered the legal parents of the child at birth and that child is at risk, existing national child protection procedures and protective measures would be available to protect that child in the same way as all other children.

⁵¹ An example of such an agreement is the memorandum of understanding concluded between Thailand and Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking.

Beaumont and Trimmings consider as follows:

Given the extremely wide variety of domestic responses to surrogacy, a Convention on surrogacy should not aim at the unification of the conflict rules. The way ahead in the general area of jurisdiction, applicable law and recognition should involve a flexible approach, an effort to recognise and make compatible the varying national systems that apply to surrogacy. Rather than focusing on traditional rules on jurisdiction and applicable law, the Convention should establish a framework for international co-operation with emphasis on the need for substantive safeguards and on procedures for courts, administrative authorities and private intermediaries. There should be an agreed division of functions between the countries involved and the countries dealing with the different functions will apply their own laws to those functions. Finally, a generous approach should be taken with respect to the recognition of cross-border surrogacy arrangements and their effects within the framework of cooperation established by the Convention, subject to a public policy exception.⁵²

The PIL framework identifies the basic criteria that would need to be covered by any comprehensive multinational instrument:

- i. Uniform rules on the jurisdiction of courts or other authorities to make decisions as to legal parentage
- ii. Uniform rules on the applicable law governing the surrogacy arrangement
- iii. Corresponding rules providing for the recognition and enforcement of parental decisions relating to the legal parentage
- iv. Uniform rules on the applicable law as to the establishment of legal parentage by way of operation of law or by agreement
- v. Uniform rules on the principles of recognition concerning the establishment of parentage by voluntary acknowledgment (i.e. birth certificates)
- vi. A framework for international cooperation⁵³

Pausing on the need for a framework for co-operation, and drawing on the experiences of the Hague Adoption Convention⁵⁴, it is suggested that the emphasis should be on states co-operating with each other and promoting co-operation amongst the competent national authorities in their states to protect children and to achieve the other objects of the con-

52 K. Trimmings and P. Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Law Reform at the International Level' [2011] 7(3) *Journal of Private International Law*, 635.

53 See the suggested framework set out by K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013), Chapter 28.

54 Chapter III, Article 7.

vention. They shall take directly all appropriate measures to (a) provide information as to the laws of their states concerning surrogacy and other general information, such as statistics and standard forms; (b) keep one another informed about the operation of the convention and, as far as possible, eliminate any obstacles to its application; (c) collect, preserve and exchange information about the situation of the child.

One of the key recommendations made by Beaumont and Trimmings is that a legal parent-child status acquired between the intending parents and the child in the state of birth should be recognised in the home state of the intending parents, subject to a public policy exception. As discussed above, it is suggested that this could be achieved through the adaptation of Article 26 of the Hague Adoption Convention which specifies that the recognition of the adoption includes recognition of '*the legal parent-child relationship between the child and his/her adoptive parents*'. From a procedural perspective, recognition could be achieved, as in adoption, through the use of a 'certificate of conformity' similar to the one introduced by Article 23 of the Hague Adoption Convention. Article 23 provides: '*[A]n adoption certified by the competent authority of the State of adoption as having been made in accordance with the Convention shall be recognised by operation of law in other Contracting States*'. The certificate of conformity serves as '*evidence of a prima facie conformity of the adoption with the Convention's system*'⁵⁵ and for practical purposes which serves as evidence of the child's status. It gives instant '*certainty to the status of the child and eliminate[s] the need for a procedure for recognition of orders, or re-adoption, in the receiving country*'.⁵⁶ Article 26(1) of the Hague Adoption Convention confirms that the recognition of an adoption includes recognition of (a) the legal parent-child relationship between the child and his/her adoptive parents, (b) parental responsibility of the adoptive parents for the child, and (c) the termination of a pre-existing legal relationship between the child and his/her birth parents, if the adoption has this effect in the Contracting State where it was made. By Article 26(2), where an adoption has the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving state, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such state. The same results could be achieved for cases of inter-country surrogacy albeit, as discussed in Chapter Four, an understanding as to what public policy in this context is required in order to promote the efficiency in practice of any harmonised rule on recognition.

For Trimmings and Beaumont, the proposed framework for a convention would only set minimum standards and would not prevent State Parties from setting higher standards for surrogacy arrangements. Yet as set out in Chapter Four, any instrument would have

⁵⁵ Hague Conference on Private International Law, 'Report of the Special Commission of October 1994', available at: <www.hcch.net/index_en.php?act=publications.details&pid=933&dtid=2>.

⁵⁶ Hague Conference on Private International Law, 'Outline: Hague Inter-country Adoption Convention', available at: <www.hcch.net/upload/outline33e.pdf>.

to be compatible with existing international human rights law to ensure the rights and respect of all parties to the surrogacy arrangement. There are a number of other areas that should be considered as part of any framework to promote conformity with international human rights law, namely, authorisation of the child's departure from the state of birth and authorisation of the child's entry in the receiving state; conferral of citizenship to the child born from surrogacy and the international human rights standards relating to the prevention of statelessness; the respect for the rights of the surrogate including, in particular, her informed and unconditional consent to the arrangements and how that is recorded; as well as the respect for and realisation of the rights of the child, such as the preservation of birth records and information.

(b) The desirability and suitability of a multilateral convention

The Permanent Bureau of the Hague Conference on Private International Law, mandated to consider the issues of international surrogacy arrangements, has undertaken two comprehensive studies on the PIL issues surrounding the status of children as well as a broad consultation process intended to elicit information from Contracting States and key stakeholders.⁵⁷ The consultation process included the drafting and circulation of four questionnaires addressed to members and other interested states, expert legal practitioners in the field, expert health professionals, and surrogacy agencies.⁵⁸ In its 2014 Study, it is noted that:

The issues surrounding the legal status of children born to ISAs [international surrogacy arrangements], and in particular the need to eliminate “limping” legal parentage and statelessness, were the most acute needs identified by States. [...] in addition many States mentioned the need to ensure respect for the rights and welfare of all parties to an ISA, including surrogate mothers and children, in any future international work. Indeed, as may be expected, the specific needs highlighted by States as those which should be addressed by future work echoed the areas of concern identified, i.e.: the need to ensure surrogate mothers' free and informed consent to ISAs; the need to ensure appropriate standards of medical care for surrogate mothers and children, including ensuring the surrogate mother's ability to retain decision-making over her own body; the need for some minimum checks concerning the intending parents' suitability to

⁵⁷ HCCH study, 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project', Prel. Doc. No 3 B of April 2014.

⁵⁸ *Ibid.* para. 4. The conclusions note that the 'Preliminary Document and the Study are not considered "final" documents: rather, they might be seen as further steps in a process. Whilst a tremendous amount of information has been obtained, there are still important gaps and more work is required to take this project forward' at para. 11 of 2014 Study – Summary.

enter into the arrangement, and the need to establish standards concerning the child's right to know his / her genetic and birth origins.⁵⁹

The Permanent Bureau also considers that the scope of any multilateral instrument requires attention: for example, whether a single-issue instrument on international surrogacy arrangements should be considered or a broader instrument on the topic of legal parentage. A combination of the two approaches could also be explored⁶⁰ with inter-country surrogacy arrangements as one (specific) aspect of a greater issue (e.g. including the particular needs of children born via ART, the right to nationality, legal parenthood, access to genetic and biological information, and finally, the legal implications of recent and potential developments in the field of assisted reproduction and new forms of human genetic modification on the horizon⁶¹ and whether these should be proscribed in surrogacy arrangements). It is considered that the necessity and need for further international work in this area is plain, both in the context of inter-country surrogacy, but also beyond in terms of legal parentage, legal status, and nationality for ART-born children.⁶²

In terms of the next steps in its 2014 Study, the Hague Conference concludes as follows:

[...] further international work might have as its objective to:

- 1) Ensure legal certainty and security of legal status for children and families in international situations; and
- 2) Protect the rights and welfare of children, parents and other parties involved with the conception of children in international situations, in line with established global human rights standards.

Formation of an Experts' Group to facilitate further exploration of the feasibility of a binding multilateral instrument (or possible non-binding measures) in this area.⁶³

69. [...] In light of the nature of the problems and the complexity of the questions raised, the Permanent Bureau considers that the [Expert's] Group should, whilst having as its primary goal further exploring the feasibility of binding multilateral options, also, in terms of the scope of the discussions to take place within the Experts' Group, the Permanent Bureau recommends, as suggested by some Members, that the Group commence by further exploring the feasibility of international work towards the first objective outlined above: that is, towards

⁵⁹ *Ibid*, para 37.

⁶⁰ *Ibid*, para. 47.

⁶¹ The pace of scientific discovery in the field of embryology is unpredictable and fast changing.

⁶² The HCCH also arrives at this conclusion at para. 40 of its 2014 Study – Summary.

⁶³ The formation of an Experts Group has now been approved by the Members, HCCH Prel. Doc. No 3A of February 2015.

achieving legal certainty for children in crossborder / international situations in terms of their legal status. This work might include further exploration of the feasibility of unifying the private international law rules concerning the establishment and contestation of legal parentage, whilst also paying special attention to the problems of legal status which arise for children in the context of ISAs. Indeed, the starting point when considering work on the legal status issues in the ISA context might be analysing whether there are reasons to apply different rules to ISA cases than those which might be developed more generally. The presumption might be that it would be best to develop a consistent set of principles concerning children's legal statuses which also work in the ISA context, perhaps with additions or specifications as necessary. Experts should also consider the form which any possible future instrument in this area might take.

71. In light of the second objective of further international work, it is considered that the broader concerns which arise particularly in the ISA context (some of which also may arise in non-ISA legal parentage cases), should also be considered carefully by the Group once discussions have progressed concerning the legal status questions and thus there is more clarity concerning the direction of future work and the shape it might take. In this respect, the feasibility and desirability of developing, at the international level, mechanisms, including possible co-operation structures, to help ensure protection for the rights and safety of the child and other persons involved in the process might be considered. Experts might consider both binding and non-binding options in this respect.⁶⁴

Whilst the necessity of further international work in this area is manifest, the feasibility of a binding multilateral binding instrument and whether there is sufficient international consensus and enhanced understanding by states to achieve such a convention are, at this stage, questionable. It is accepted that a comprehensive multilateral convention specifically aimed to resolve the challenges of inter-country surrogacy has various advantages: it is accessible and it facilitates certainty by permitting states to agree upfront about the form and content of the legal consequences. These are all characteristics that stakeholders such as the judiciary, the legislator, the executive, academia, and the parties to the arrangements themselves require. It must be accepted that a treaty would, once ratified, enjoy the force of law and, on its own, be identified as or become a source of obligation for states. Considerations having to do with feasibility suggest that any convention must be neutral about whether surrogacy be permitted. It should be cautioned, however, that even the adoption

⁶⁴ HCCH 2014 Study.

of a new convention may not be without drawbacks. Any new convention is unlikely to provide a full solution. A treaty will take time to negotiate and may lack state support, illustrated by a low number of ratifications in other family law areas. Some cases may still fall outside that future framework. Furthermore, even if an agreement on harmonised rules were reached, any new convention is likely to contain an *ordre public* clause allowing State Parties to prevent the application of foreign law or the recognition of a foreign decision on parentage where it would be manifestly contrary to public policy.⁶⁵

Though a ‘hard-law’ standard is arguably the most desirable response, it may be more appropriate (and more effective in terms of support and participation of key stakeholders including states) to work towards the implementation of ‘soft-law’ measures, at least initially. This conclusion is based on the premise that non-binding instruments sometimes attract broader support of states and the private sector more easily. Many issues may not be taken forward politically if legally binding instruments were proposed. Indeed, in three responses to the Hague Conference’s Questionnaire on inter-country surrogacy, three states (Israel, Monaco, and the USA) responded that no further work should be undertaken towards an instrument on the PIL issues concerning legal parentage generally.⁶⁶ The differences in domestic law and, as discussed in Chapter Three, national practice need not prevent work at the international level, but the overall picture emphasises the importance of focusing on building bridges and awareness between legal systems, based on internationally established minimum standards and principles. To quote the Warnock Report, ‘[w]e accept that there is a case for an international approach. This approach will be best formulated, however, when individual countries have formed their own views, and are ready to pool knowledge and experience’.⁶⁷ This comment remains very relevant in considering the feasibility of the method of international action in this field.

To assist with the task, attention now turns to consider the desirability and suitability of nonbinding measures in this area. Whilst this study is concerned only with the civil status of surrogate-born children, the discussion may also prove to be of broader interest and relevance in considering principles and guidelines with respect to the civil status of all children (including those born by ART) in international situations. Indeed, whilst this research has identified that a harmonious response to surrogacy is needed in satisfaction and furtherance of states’ obligations under international human rights law, the continuity of civil status and the avoidance of statelessness for all children are, in children’s rights terms, a priority.

⁶⁵ It is accepted that mutual recognition of foreign decisions could be automatic albeit this is believed to be unlikely in this subject-matter.

⁶⁶ HCCH 2014 Study – Conclusions, para. 51.

⁶⁷ Warnock Report at 1.8.

(c) The desirability and suitability of guidelines and recommendations

Returning to the discussions in Chapters Two and Three, despite the tendency of some to consider ‘prohibition’ and ‘regulation’ of surrogacy as opposed and nonoverlapping positions, it is possible to envision a wide range of legal or policy approaches that might effectively minimise or eliminate some of the problematic aspects of inter-country surrogacy. It has also been concluded that states have an obligation to review and revise any related laws, policies, and practices to ensure that they support all human rights obligations for each of the parties to a surrogacy arrangement.

It has become apparent throughout this thesis that there is a clear need for practical, rights-based policy guidance in the context of surrogacy. If there is to be an international coordinated response, it will need to protect the human rights of all those involved in such arrangements by complying with existing human rights standards, but also, quite possibly, it will need to set down and record express standards and safeguards in the transnational context of this unique phenomenon. It is easy to see then how effective judicial and administrative cooperation is essential to help ensure compliance with any such standards and safeguards. This work would need to be pragmatic and take into account the realities on the ground.⁶⁸ The adoption of a ‘soft-law’ text can also be the first step towards a binding standard and as a tool to assist states with the national reviews that this study recommends. As suggested above, sometimes soft-law instruments prepare the way for a binding document. Soft-law instruments can also raise awareness and can provide states with practical guidance. Some soft-law instruments have become points of reference – referred to in national legislation, national, regional and international jurisprudence, or in other international instruments.⁶⁹

The experience in other areas with guidelines and recommendations within the UN system, for example, tends to demonstrate that such recommendations are generally followed.⁷⁰ Secondly, as the international community’s understanding of the needs of surrogate-born children and each of the parties to a surrogacy arrangement continues to evolve and deepen, it may be necessary to revise the conclusions of any recommendation in a few years, but that would be very difficult if the binding form of a convention were chosen. Thirdly, the form of the instrument, being non-binding, leaves the states some flexibility in applying them, which the special circumstances of surrogate-born children and their families may require. At the same time, they could form a basis for harmonisation of substantive law in this area if that were to be deemed necessary. Fourthly, guidelines or a recommendation offers the advantage of being available to be applied immediately, even

68 W. Duncan, ‘Future Developments in International Family Law with Special Emphasis on Cross-border Child Protection: A View from The Hague’ [2010] *International Family Law* 24.

69 E.g. the UNHCR Recommended Principles and Guidelines on Human Rights and Human Trafficking and Commentary (HR/PUB/10/2).

70 E.g. *ibid.*

pending the entry into force of any convention. Such texts usually provide a foundation for lobbying activities and public education and building political understanding and support.

It is accepted that any principles and guidelines, which are not contained in a treaty or similar instrument, are not capable of giving rise to immediate legal obligations.⁷¹ However, this does not mean that such principles and guidelines are without legal significance. As this research has demonstrated, and discussed further below, certain aspects of any guidelines should (i) be based upon established customary rules of public international law to which all states are bound, including those relating to fundamental human rights and state responsibility; (ii) reiterate, or make specific to the context of surrogacy, norms and standards contained in existing relevant international agreements; and (iii) promote harmonised PIL rules. It is important to note that agreed principles and guidelines also establish a framework for state practice that may itself provide the basis for emergent customary international law.

It is also suggested that a document which provides broad guidance will require more specific elaboration and adaptation to particular country contexts. That being so, any guidance cannot be exhaustive: instead, it should be issued as a first step to address human rights obligations. It can be expanded and updated as necessary.

Bringing these ideas together, it is suggested that what is needed at the first instance is a soft-law instrument dealing with parentage and nationality within a child's rights framework.⁷² Such an instrument would provide provisions which would provide valuable guidelines to states and, being essentially standard setting, lead to a bridging of the approaches. The objective of any instrument being to provide guidance for policymakers, courts (national, regional, and international), surrogacy providers, and others on standards and principles and some of the priority actions needed to ensure that different human rights dimensions are systematically and clearly integrated into the provision of surrogacy services. The principles could then be used as a checklist against which laws, policies, and interventions can be measured.

Before offering some suggestions as to content, one further issue needs to be discussed, namely, which forum should lead and coordinate the approach.

(d) Choice of forum

As suggested above, particular attention should be given to the body⁷³ and procedural steps involved in preparing any international framework of recommended principles and

⁷¹ *Ibid.*

⁷² This author supports the use of such an instrument to develop a consistent set of principles concerning children's legal statuses beyond the context of surrogacy.

⁷³ The controversy surrounding the status of the Draft Recommendation on the rights and legal status of children and parental responsibilities demonstrates that a lack of regional consensus among European states

guidelines. A number of international and regional bodies would be important stakeholders in addressing the topics of parentage and nationality and the related human rights protection. Several obvious factors influence the choice of location.⁷⁴ They include the competence of an organisation to discuss the issue in question, the access of key actors to its procedures, and the preferred nature of the standards. Global principles and standards usually require an intergovernmental process that allows most or all states to participate. Traditionally, human rights standards have been negotiated at the United Nations. At regional level, human rights standards are negotiated by regional organisations such as the African Union, the Council of Europe, and the Organization of American States. Those wishing to promote existing standards (or new standards) clearly have to decide which forum offers the highest chance of success.

Because it is believed that the case for a broader approach is strong, the coincidence of recently reported cases of surrogacy, the acceptance that the international human rights obligations placed on states are not yet widely or well understood, and the comprehensive work of the Permanent Bureau of the HCCH to date represents a historic opportunity to respond to the legal difficulties posed by inter-country surrogacy and to draft principles and guidelines. To accelerate progress, there are a number of benefits if the Experts Group mandated by the Members of the Hague Conference were to be mandated to examine the possibility of preparing and drafting a framework recommendation setting out principles and minimum standards in the context of inter-country surrogacy (and, more broadly, the civil status of all children in international situations).⁷⁵ Given the PIL focus of the HCCH, an Experts Group (or a guideline development group) should comprise members⁷⁶ of an international panel of human rights, bioethicists, and public health experts as well as experts in criminal law, nationality, family law and women's rights. Consultation or partnership with the UNHCR, the OHCHR, and/or UNICEF would also be invaluable. New ways to use independent experts might be explored. UN Special Rapporteurs and academic and other technical experts might also offer a vital role in proceeding with this standard setting. It is accepted, however, that taking action is likely to require the provision of resources and funds allocated for this exercise.

As discussed in Chapter Five with respect to the prevention of statelessness in this field, it was concluded that the role and contribution of the UNHCR would be constructive. The

concerning issues relating to legal parentage creates significant difficulty in seeking to harmonise substantive laws in this field. It should be noted that a recommendation to be adopted by the Council of Europe requires consensus by the Contracting States.

74 See the practical comments and experience of the International Council on Human Rights Policy 'Human Rights Standards: Learning from Experience' [2006] available at: <www.ichrp.org/files/reports/31/120b_report_en.pdf>.

75 Of course, if the Permanent Bureau were to be mandated to explore and then draft a convention that would give rise to immediate legal obligations for the state parties.

76 Having declared any interests of relevance to this work.

Human Rights Committee and/or the Committee on the Rights of the Child should consider a General Comment on the right of a child to acquire a nationality in order to clarify the application of existing international human rights law where a surrogate-born child (or more broadly in the context of assisted reproductive procedures) would otherwise be stateless. Any Comment (or Recommendation) should reaffirm the full application of existing international law and human rights standards to the situation of nationality and the prevention of statelessness. This could be achieved through a restatement of the entire catalogue of relevant rights, a technique employed in other instruments such as the CRC and the Convention on the Rights of Persons with Disabilities.

(e) Framework for recommendation with principles and guidelines

The development of principles and guidelines is in response to the clear need for practical, human rights-based policy guidance and to encourage states and intergovernmental organisations to make use of them. To assist with these objectives, a supporting commentary of the recommended principles and guidelines could be prepared to provide a detailed overview of the legal aspects focusing particularly, but not exclusively, on international human rights law.

What follows is an illustration of what could be achieved if principles⁷⁷ were to be codified and adopted:

- i. Best interests of the child – In all civil status matters concerning children, the best interests of the child should be the primary consideration. It should be underlined that it is in the best interests of the child, first of all, to establish parentage as from the moment of the birth and, secondly, to give stability over time to the established parentage.
- ii. Non-discrimination of the child – Children should not be discriminated on grounds such as sex; race; colour; language; religion; political or other opinion; national, ethnic, or social origin; sexual orientation; disability; property; and birth or other statuses, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities. This includes the aim to eliminate all forms of discrimination, including discrimination based on family type and relationship status. All children must be treated substantially equally, irrespective of the circumstances of their birth. That purpose is consistent with treating the child born with a genetic link or an adopted link in substantially the same as a child born as a result of surrogacy.
- iii. Principles relating to the establishment of parentage.
- iv. Principles of MAR in the establishment of parentage.
- v. Contestation of parentage and the change of parentage.
- vi. Principles relating to the recognition of parentage established abroad.

⁷⁷ Consideration as to the content of some of these principles is set out in the following paragraphs.

- vii. Principles relating to the legal consequences where parentage has not been established.
- viii. Principles relating to the following matters: the family name of the child, parental responsibilities, maintenance, succession; and the right of the child to information about his or her origins.
- ix. Conflict of interests – The interests of the child should be protected whenever they may be in conflict with the interests of the holders of parental responsibilities.
- x. Nationality of the child – Principles relating to the establishment of nationality at birth and the prevention of statelessness. The policy regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which a surrogate-born child is stateless.
- xi. Principles relating to compliance with international standards for voluntary, informed, and unconditional consent to the surrogacy process in the required legal form, and expressed or evidenced in writing, free of violence and coercion and the relinquishment of the child. No person should be exploited for their reproductive capabilities.
- xii. Due diligence of all states – States must both themselves respect human rights and ensure compliance with human rights by non-state actors, in accordance with the duty of due diligence. A failure on the part of the state to protect, respect, promote, or fulfil its human rights obligations – owed to every person within its jurisdiction – is something that is directly attributable to the state and, therefore, sufficient to trigger its international legal responsibility. Whilst the principle should affirm that it is the primary obligation of states to implement human rights, recommendations should emphasise, however, that all actors have responsibilities to promote and protect human rights. Additional recommendations could therefore be addressed to the UN human rights system, national human rights institutions, the medical and legal communities, and others.

There is precedent in other legal areas to proceed with the preparation of common principles and guidelines.⁷⁸ The Yogyakarta Principles offer an example. In part because of the sensitivity of the subject matter, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations and

⁷⁸ E.g. the UNHCR Recommended Principles and Guidelines on Human Rights and Human Trafficking and Commentary (HR/PUB/10/2); The UN Guiding Principles on Business and Human Rights establish an authoritative global standard on the respective roles of businesses and governments in helping ensure that companies respect human rights in their own operations and through their business relationships. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. There are examples beyond the UN forum, such as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights published in the [2012] Human Rights Quarterly 34.

international human rights experts, convened a meeting in Indonesia to develop a set of international principles regarding sexual orientation and gender identity. Twenty-nine distinguished experts in human rights law from 25 countries unanimously adopted the Yogyakarta Principles,⁷⁹ which they agreed ‘*reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity*’. As set out in the Statute of the International Court of Justice, the views of such experts may be relied upon in determining rules of law.⁸⁰ The Yogyakarta Principles, rigorously supported by 66 pages of jurisprudential annotations,⁸¹ affirm a broad range of rights, including ‘*the universal enjoyment of human rights, equality and non-discrimination [...] to which all human beings are entitled without distinction as to sexual orientation or gender identity*’. The Yogyakarta Principles also set out concrete measures states must take to assure these rights.

In the context of parentage and parental responsibilities, other examples include the CEFL Principles and the work of the Council of Europe. The Council of Europe’s ‘White Paper’ on Principles Concerning the Establishment and Legal Consequences of Parentage (2001)⁸² is a set of principles concerning the establishment and legal consequences of parentage. Due to the low number of comments from the Council of Europe Member States and the fact that national legislation in the field of assisted reproduction was then still in the process of development, it was eventually decided to adopt and publish this document as a report instead of an official recommendation.⁸³ In 2009, steps were taken to revive the idea of a new instrument on (among other things) parentage and parental responsibilities. Lowe wrote a detailed report proposing a new European Convention on Family Status. This proposal was part of a study into the rights and legal status of children being brought up in various forms of marital or nonmarital partnerships and cohabitation.⁸⁴ This resulted in a draft recommendation on the rights and legal status of children and parental responsibilities (the ‘Draft Recommendation’).⁸⁵ The Draft Recommendation has

79 Available at: <www.yogyakartaprinciples.org>.

80 Article 38(1)(d) ICJ Statute provides in pertinent part: ‘The Court [...] shall apply [...] the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.

81 M. O’Flaherty, ‘Jurisprudential Annotations to the Yogyakarta Principles’ (2007) available at: <www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudentialannotations.pdf>.

82 CJ-FA (2001) available at: <[www.coe.int/t/e/legal affairs/legal cooperation/steering committees/cdcj/Documents/2004/cdcj-bu%202004%203%20e%20-%20White%20Thesis.pdf](http://www.coe.int/t/e/legal%20affairs/legal%20cooperation/steering%20committees/cdcj/Documents/2004/cdcj-bu%202004%203%20e%20-%20White%20Thesis.pdf)> CDCJ-Bu (2004) 3.

83 Council of Europe Committee of experts on Family Law, Report on principles concerning the establishment and legal consequences of parentage – ‘The White Paper’, 23 October 2006, CJ-FA (2006) 4 e; Council of Europe European Committee on Legal Co-operation, ‘White Paper’ on principles concerning the establishment and legal consequences of parentage, 15 January 2002 (adopted 11-14 May 2004), CJ-FA (2001) 16 rev.

84 N. Lowe, ‘A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation’ 21 September 2009 CJ-FA (2008) 5.

85 Council of Europe Committee of Experts on Family Law, Draft Recommendation on the rights and legal status of children and parental responsibilities, 27 May 2010, CJ-FA-GT3 (2010) 2 rev. 2. The recommendations are set out in this chapter.

not yet been adopted. The Draft Recommendation provides minimum standards for issues concerning the rights and legal status of children and parental responsibilities. There are many similarities between the Draft Recommendation and the White Paper. This is easily explained as both documents originate from the same organisation and concern the same or similar issues, and the Recommendation was drafted within a relatively short period of time after the White Paper.⁸⁶ Whilst the Draft Recommendation is a Council of Europe instrument, European in focus and not drafted for application beyond the Member States of the Council of Europe, reference to the Draft Recommendation as a drafting source for principles and guidelines is nonetheless appropriate given its contribution to the identification of relevant principles.⁸⁷

Building upon the broad principles set out above, the key tenets set out in the Draft Recommendation, which are relevant to a discussion on surrogacy, are set out below and have been adapted where relevant mindful of the specific context of surrogacy.

Based on Article 2(1) CRC and on Article 14 ECHR, the basic principle of non-discrimination set out by Article 1 provides the bedrock of this recommendation. As Article 2(1) CRC recognises, it is important that children are protected from discrimination due to the civil status of their parents. Paragraph 1 highlights this and extends the principle not just to discrimination based on parentage (defined in Article 2) but also with respect to other holders of parental responsibilities (defined in Article 20). Paragraph 2 emphasises that children should⁸⁸ not be discriminated against due to the civil status of their parents.

The principles on legal parentage should reflect a balance between the 'genetic truth', reflecting genetic parentage, and 'social parenthood', reflecting the fact with whom the child is living and who is actually taking care of him or her. Article 2 (Definition of parents) makes it clear that the Draft Recommendation only deals with questions concerning legal parentage (persons for whom legal parentage has been established in accordance with national law including its PIL rules).

Article 7 (The establishment of maternal affiliation)⁸⁹ provides the general rule that the woman who gives birth to the child is to be considered the legal mother regardless of genetic connection. As an exception to the general rule, paragraph 2 permits states to qualify it by having other rules on establishment of maternal affiliation, such as the

86 The European Committee on Legal Co-operation (CDCJ) held its 86th meeting in Strasbourg on 12-14 October 2011, Meeting Report CDCJ (2011) 15.

87 From a practical perspective, the reference to the contribution made by the Draft Recommendation avoids, in part, a duplication in efforts.

88 In the Explanatory Memorandum, the Council of Europe comments that while, in its Draft Recommendation 'should' is frequently used where the relevant principles are taken from a binding legal instrument, the use of 'should' must not be understood as reducing the legal effect of the binding instrument concerned.

89 Principle 7: 'The establishment of maternal affiliation: 1. The woman who gives birth to the child should be considered as the legal mother regardless of genetic connection. 2. States may qualify the general principle by having other rules on the establishment of maternal affiliation. 3. States having legislation governing surrogacy arrangements are free to provide for special rules for such cases'.

inscription of the name of the mother on the birth certificate, recognition, or the decision of a competent authority. This approach reflects the differing legal basis of motherhood across states. Paragraph 3 provides for a second important exception to the general rule in the context of surrogacy arrangements. Paragraph 3 allows for the possibility of states providing, for example, that such arrangements need court approval. In such cases, it is the intending mother ('commissioning woman' is the term referenced in the Draft Recommendation) who is the legal mother and not the woman giving birth, or, in the case of an implanted embryo, the intending parents (again, 'commissioning spouses' as referenced) and not the woman giving birth and her spouse or partner are regarded as the legal parents. As discussed in Chapter Three, the terminology in this area needs agreement.

Article 17 is predicated upon the assumption that a state permits MAR procedures, but it is to be emphasised that this provision is not thereby intended to imply that states should permit such procedures. Nevertheless, where a state does so permit, paragraph 1 makes it clear that it should also provide for appropriate affiliation rules. The rules set out in Article 17 are only intended to apply to MAR procedures under a state's permitted scheme and not therefore apply to privately arranged MAR procedures. Again, this approach reflects the differing rules on parenthood in cases of MAR.

Article 17(1)(a) deals with the situation of conceptions as a result of donated gametes or embryos. Commonly, such donors (particularly male gamete donors) are anonymous, though the Draft Recommendation is silent on the issue of anonymity in such cases. Instead what paragraph 1(a) provides for is that those states that have rules on MAR are free to determine that the gamete or embryo donors are not considered the legal parents.

Paragraph 1(b) permits states to provide that the man who is the spouse or (in states that permit heterosexual registered partnerships) the registered partner of the woman whose child was conceived by such a procedure is considered the legal father unless it is established that he did not consent to the procedure. According to Article 18(1), the lack of consent provides one of the grounds upon which the husband or registered partner can contest paternal affiliation in these types of cases.

Paragraph 1(c) permits states to consider the cohabiting partner of the woman whose child was conceived by such a procedure to be the legal father provided both he and the woman have given written consent either before or at the time of such a procedure.

Paragraph 3 provides for the possibility of states considering the female spouse, registered partner, or cohabiting partner of the woman whose child was conceived as a result of medically assisted procreation to be a legal parent. This possibility is contingent upon (a) states having rules on MAR and (b) that they also permit same-sex marriages or same-sex registered partnerships. It would, however, need to be considered whether the approach discriminates against the child for the purposes of Article 1 if states do not make such provision.

Paragraphs 3 (a) and (b) mirror, respectively, paragraphs 1 (b) and (c) and place the female spouse or registered partner or cohabiting partner in the equivalent position as male spouses of the woman whose child was conceived as a result of medically assisted procreation. For the Draft Recommendation, such spouses or registered partners are considered as legal parents unless it is established that they did not consent to the procedure. A cohabiting partner is only considered as the legal parent if both she and the woman who gave birth have provided written consent before or at the time of the procedure. The reference to 'legal parent' in both paragraphs 3 (a) and (b) leaves open the question of whether states should consider qualifying such women simply as a legal parent or as a 'co-mother'. States are not prevented from introducing or applying higher standards proposed or to adopt legal terminology that reflects their cultural and ideological preferences.

It is important to stress that the Draft Recommendation does not deal with or resolve PIL issues. Consequently, nothing in the proposed instrument obliges *stricto sensu* states to recognise a status accepted by another state that they do not themselves recognise. The Draft Recommendation seems to suggest that it is for the Contracting States to decide whether or not to legislate in the field. However, as discussed, the 'cross-border' effect of the surrogacy arrangements for these children and their families as well as states requires attention. In the context of inter-country surrogacy, principles relevant to recognition and the public policy exception are necessary to ensure continuity in the parent-child relationship status.

Article 4 (Children's right of access to information concerning their origins) underlines the general right of children to have access to information concerning their origins especially in the light of Article 7(1) CRC and taking into account Article 8 ECHR. Nevertheless, it is not intended to make a provision that would establish an absolute right of a child to know his or her origins. A balance has to be struck between children's right to information about their origins and the right *inter alia* of gamete providers to remain anonymous. This proposed article sets out the general position that children should have access to recorded information concerning their origins. Exceptions to this general rule may arise to protect the rights and interests of the child and/or the persons who procreated the child. In those cases where the persons who procreated the child have a legal right not to have their personal information disclosed, it would still be open to the state to determine whether to override that right and disclose relevant information, particularly non-identifying information, having regard to the circumstances and to the respective rights of the child and the persons involved.

In addition, principles relating to the establishment of nationality at birth and the prevention of statelessness should be included. Principle 12 of Recommendation 2009/13 offers a starting point. Any principle should recommend that states should, '*apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is*

established or recognised by law’,⁹⁰ which ‘*underlines that if recognition takes place this should also have consequences in nationality law*’.⁹¹ The policy of states regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless.

The main principles established by the CRC and the case law of international courts and human rights treaty bodies (e.g. the European Court of Human Rights and the Committee on the Rights of the Child) should be taken into account in order to set out concrete measures (with examples) states must take to assert the rights and principles enunciated. From the comparative review in Chapter Three and the review of the obligations under international human rights law and in Chapter Four, the following standards have been identified:

- i. The unconditional and informed consent of surrogates (and, on the basis that they may be legal parents at birth, their husbands/partners) to any surrogacy arrangement. Documented procedures to obtain informed consent should be established. The information surrogates receive from professionals should be as comprehensive and clear as possible. The surrogate should not be subjected to any pressure from the intending parents, from her family and friends, and from intermediaries or others. Consideration should also be given to the social risks of stigmatisation for surrogates living in a culture radically different from that of the intending parents. These risks need to be considered as well as the physical risks in a gender-sensitive way. Ensuring that quality care is provided before and during pregnancy and after delivery, for as long as is required to ensure the welfare of the surrogate, as well as requiring intending parents to take out insurance to cover the costs of any treatment required by the surrogate is something to be advised and hopefully implemented. Informed consent guidelines must be developed that not only meet Western societies’ definition of the process but also are culturally relevant to women in low-resource countries where there are likely challenges related to education and other factors in understanding the risks of surrogacy. Consent must be secured with relevant language, both verbal and written, and with an impartial counsellor facilitating the process. The surrogate must be provided with comprehensive information about the risks, physical and psychological, entailed in surrogate pregnancy and relinquishing a child.

The timing of such consent is an essential factor. A period of reflection between any initial approach to act as a surrogate and any attempt to establish a pregnancy should be prescribed. Clear information should be provided on the possible means of establishing pregnancy, and the potential risks of unsupervised self-insemination should be spelled out. Where a surrogate is proposing to bear a child for a friend or relative the

⁹⁰ See Principle 12.

⁹¹ Para. 33 of the Explanatory Report.

- importance of free, informed consent in such altruistic arrangements and the risks particular to such arrangements should be detailed.
- ii. Promoting transparency; this point is particularly crucial in preventing the exploitation of surrogate mothers, the intending parents, and the surrogate-born child. Financial transactions, mainly the compensation for surrogates and intermediaries, must be managed in a manner that is both transparent and safeguarded, including how financial incentives are used in the consent process. Further, in terms of transparency, a surrogacy clinic could be required to report its transactions to a national oversight body in that country with clear documentation of the amount of money paid to each surrogate per pregnancy.
 - iii. Accountability; it is recommended that effective accountability mechanisms are in place including monitoring and evaluation, and remedies and redress, at the national level. The need for evaluation and monitoring of all national programmes and respect for human rights must occur. A framework for international cooperation should be developed with emphasis on the need for substantive safeguards and on procedures for courts, administrative authorities, and intermediaries.

6.4 JOINT GENERAL COMMENT/RECOMMENDATION OF THE COMMITTEE ON THE RIGHTS OF THE CHILD AND THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

Given the extremely wide variety of domestic responses to surrogacy, a broader international response may give impetus and further attention to some or a number of issues with a view to promoting solutions at a state and international level. A joint General Comment or Recommendation by the Committee on the Rights of the Child and the CEDAW Committee on the legal status and nationality of children arising from surrogacy (and, more broadly, the legal status of children, affected by the development of society and by progress in areas such as technology, genetics and medically assisted procreation) and the application of the obligations pursuant to CEDAW in the context of states' obligations to surrogates and egg donors would be welcome. The Committees could elaborate and adopt a General Comment/Recommendation on harmful practices which comprehensively addresses the situation and concerns of women and surrogate/ART-born children by upholding the rights inscribed in the CRC, CEDAW, and international law.

The Committee on the Rights of the Child should also consider making a recommendation to the General Assembly that a study be undertaken on the legal status of surrogate-born children or, more broadly, children born as a result of ART. The Committee could make this recommendation pursuant to Article 45(c) CRC which provides that '*the Com-*

mittee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child’.

Lastly, there is likely to be an increased role for the CRC Committee and Human Rights Committee in considering the position of surrogate-born children in a number of jurisdictions (e.g. Russia, Thailand, Georgia, Ukraine, Mexico, the USA, and India). The UPR also affords a unique opportunity to raise awareness of any human rights violations. It presents an opportunity to highlight concerns, foster positive developments, build international support, and make concrete recommendations for change and the promotion of lawful practices globally.

6.5 FINAL REFLECTIONS: A WORK IN PROGRESS

Over the past decade, surrogacy has moved from the margins to the mainstream of international concern. Surrogacy and the increasingly available and sophisticated reproductive technologies challenge traditional assumptions about parenthood and family unities. The rapid pace of these changes has created a gulf between the realities of family life for many families and most statutory norms.

In most cases, it has been considered that the practical implications for a child of having one’s most important and intimate loving relationships kept outside of a framework of legal protection and regulation can be devastating. As Lowe in his study for the Council of Europe’s Committee of Legal Experts on Family Law has said:

Children do not live in a vacuum, but within a family and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is arguably as discriminating to the child to limit legal parenthood or to deny significant carers legal rights and responsibilities as to accord the child a different status and legal rights according to the circumstance of their birth or upbringing.⁹²

In 1990, Julie Martin summarised the position of surrogacy in Australia – although her words resonate globally – in the following terms:

In the midst of forceful opposition from feminists, churches and groups concerned with preserving the ‘traditional’ family, together with powerful support from sections of the medical establishment, certain academics and other high

⁹² N. Lowe, ‘A Study into the Rights and Legal Status of Children Being Bought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation’ CF-JA (2008) 5, 10 March 2008, 3.

profile individuals, the future of surrogacy in Australia is uncertain. What is certain is that surrogacy challenges people's ideas about acceptable means of family formation both on a personal moral level and from the broader perspective of public policy.⁹³

The situation is largely unchanged today.

The purpose of this research has been relatively simple: it has sought to determine how best to protect the civil status and nationality rights of children in inter-country surrogacy by providing content to the principles set out in European and international human rights law. In doing so, it has provided practical examples from the research legal systems and other jurisdictions of the issues that can arise in establishing regulation for inter-country surrogacy and how these can be improved upon by using a children's rights framework.

Returning then to the research questions, it has been established that national laws on parenthood and the establishment of nationality at birth do not sufficiently protect the interests of these children and the parties to a surrogacy arrangement. The specific circumstances of surrogacy necessitate national and international responses to mitigate the harmful consequences of limping legal relationships, the non-continuity of the child's personal status, and a child protection framework that places the rights of the child and those of the parties to these arrangements at its core. Initially soft-law solutions and then, building upon that momentum, hard-law solutions as set out in this chapter are required. This will, however, not be an easy task. In the end, what is required is a significant degree of political will and commitment by civil society and stakeholders. A sense of realism is necessary if any effective progress is to be made.

In this author's view at least that it is arguably better at this stage given the diverging national approaches to surrogacy (to the extent that a consistent approach is identifiable) to put forward soft-law solutions, which lay the groundwork for hard-law responses and are consistent with general practice, identifiable human rights standards, and legal approaches already largely accepted by states and which may be politically 'acceptable' in the circumstances but which still address in a meaningful and workable way, the parental and civil status of these children. Of course, this represents a compromise and will perhaps not placate those who advocate for an international treaty response. It is not the intention of this author to argue for something that does not have a realistic chance of being taken up in the immediate future. To argue too broadly too early may undermine the feasibility and effectiveness of any coordinated response to inter-country surrogacy.

So, in summary therefore, the central proposal of this book represents a 'work in progress' towards even greater protection of the interests of these children, albeit one that,

93 J. Martin quoted in K. Simmonds, 'Reforming the Surrogacy Laws of Australia; Some Thoughts, Considerations and Alternatives' [2009] 11 *Flinders Journal of Law Reform* 97.

it is submitted, goes a considerable way towards framing national and international responses in a human rights framework. This proposal is in line with the standards required by international society and by the development of legal doctrine. It certainly does not and does not purport to offer an all-encompassing 'solution' to every challenge posed by inter-country surrogacy in every circumstance. The proposal put forward in this thesis represents a logical step forward along this evolutionary path.

The law tends to be considered in discrete subjects: family law, the law of nationality, the law of contract, and so on. This can make the law more readily navigable but can mean that issues which arise with legal relationships that straddle a number of different subjects may not be considered holistically. Reaching an understanding of surrogacy and its consequences takes more than one disciplinary approach. In fact, it takes a collection of coordinated multidisciplinary approaches in order to achieve a coherent and fully considered response to surrogacy. It is hoped that in conducting further reviews, there is consultation as widely as possible with individuals and organisations with interests in the practice of surrogacy. Consultation with, for example, nationality experts at the UNHCR, international child law experts at UNICEF, the Permanent Bureau of the HCCH, as well as public health experts would be invaluable (it is also sensible, from a practical point of view, that the stakeholders should not duplicate work done by others). Along with the children, the donors, the surrogates, and the intending parents are the players in this unfolding history, and their insight and experience are crucial to an informed understanding of the scope and extent of the problem areas and, more importantly, how these can – and should – be addressed.

APPENDIX 1

HUMAN RIGHTS OF PARTICULAR SIGNIFICANCE TO CHILDREN

Right/Obligation	Treaty Source
Dignity	<ul style="list-style-type: none"> • Universal Declaration of Human Rights, article 1 • Convention on the Rights of the Child, preamble • EU Charter of Fundamental Rights, article 1
The right of children to protection from all forms of discrimination irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political, or other opinion, national, ethnic or social origin, property, disability, birth or other status	<ul style="list-style-type: none"> • Universal Declaration of Human Rights, articles 2 and 25(2) (and to protection of the state, article 3) • Convention on the Rights of the Child, article 2 • African Charter on the Rights and Welfare of the Child, article 3 • European Convention on Human Rights, article 14 • American Convention on Human Rights, article 1 (and to special protection of the state, article 19) • EU Charter of Fundamental Rights, article 21
The best interests of the child to be the primary consideration in all actions concerning children	<ul style="list-style-type: none"> • Convention on the Rights of the Child, articles 3, 7 and 8 • African Charter on the Rights and Welfare of the Child, article 4 • EU Charter of Fundamental Rights, article 24(2)
Right to private and family life	<ul style="list-style-type: none"> • European Convention on Human Rights, article 8 • Convention on the Rights of the Child, articles 5, 9, and 18) (the right to grow up without interference (article 16) • International Covenant on Civil and Political Rights, article 17 • EU Charter of Fundamental Rights, article 7
Right to an identity and information about origins	<ul style="list-style-type: none"> • European Convention on Human Rights, article 8 • Convention on the Rights of the Child, articles 7 and 8 • Covenant on the Rights of the Child in Islam, article 7
Right to birth registration	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 4 • African Charter on the Rights and Welfare of the Child, article 6(2) • Covenant on the Rights of the Child in Islam, article 7(1)
Right to be heard and to express views in proceedings	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 12 • European Convention on Human Rights, Article 8 • European Convention on the Exercise of Children's Rights, article 3 • EU Charter of Fundamental Rights, article 24(1)

Right/Obligation	Treaty Source
Prohibition on the illicit transfer abroad	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 11
Protection of children from economic exploitation	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 32 • African Charter on the Rights and Welfare of the Child, article 15
Protection of children from sexual exploitation and abuse	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 34 • Optional Protocol on the sale of children, child prostitution and child pornography (Optional Protocol on the sale of children) • African Charter on the Rights and Welfare of the Child, articles 15, 16 and 27
Protection of children from abduction, sale, or trafficking	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 35 • Optional Protocol on the sale of children • African Charter on the Rights and Welfare of the Child, article 29
Protection of children from other forms of exploitation	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 36
Access to nationality	<ul style="list-style-type: none"> • Universal Declaration of Human Rights, article 15 • International Covenant on Civil and Political Rights, article 24(3) • Convention on the Rights of the Child, articles 7 and 8 • American Convention on Human Rights, article 20 • African Charter on the Rights and Welfare of the Child, article 6 • Arab Charter on Human Rights, article 29 • Covenant on the Rights of the Child in Islam, article 7
Prevention of statelessness	<ul style="list-style-type: none"> • Convention relating to the Status of Stateless Persons • Convention on the Reduction of Statelessness • Convention on the Rights of the Child, article 7

APPENDIX 2

HUMAN RIGHTS OF PARTICULAR SIGNIFICANCE TO WOMEN

Right/Obligation	Treaty Source
Dignity	<ul style="list-style-type: none"> • Universal Declaration of Human Rights, article 1 • Convention on the Elimination of Discrimination Against Women, preamble • EU Charter of Fundamental Rights, article 1
Freedom from all forms of discrimination	<ul style="list-style-type: none"> • Convention on the Elimination of Discrimination Against Women, article 1 • American Convention on Human Rights, article 1 • European Convention on Human Rights, article 14 and Protocol No. 12 • International Covenant on Civil and Political Rights, article 26 • African Charter on Human and Peoples' Rights, articles 2 and 18
Respect for life and physical and mental integrity	<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights, articles 6, 7 and 9 • African Charter on Human and Peoples' Rights, articles 4, 5 and 6 • American Convention on Human Rights, articles 4, 5 and 7 • European Convention on Human Rights, articles 2, 3 and 5 • EU Charter of Fundamental Rights, article 3
Freedom from cruel and inhumane treatment/harmful practices	<ul style="list-style-type: none"> • Convention on the Elimination of Discrimination Against Women, articles 2, 5 and 16 • Inter-American Convention on Human Rights, article 6
The right to the highest attainable standard of physical and mental health	<ul style="list-style-type: none"> • Universal Declaration of Human Rights, article 25 • Convention on the Elimination of Discrimination Against Women, articles 12(2), 10(h) and 16(1)(e) • Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, article 3 • International Covenant on Economic, Social and Cultural Rights, article 12 • Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, article 14
Prohibition on the exploitation of women	<ul style="list-style-type: none"> • Convention on the Rights of the Child, article 11 • Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa • Rome Statute of the International Criminal Court

Right/Obligation	Treaty Source
	<ul style="list-style-type: none"> • United Nations Convention against Transnational Organized Crime • Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime • Declaration on the Elimination of Violence against Women • African Charter on Human and Peoples' Rights • American Convention on Human Rights • Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women • European Convention on Human Rights
Protection of women from slavery and involuntary servitude	<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights, article 8(1) • African Charter on Human and Peoples' Rights, article 5 • American Convention on Human Rights, article 6(1) • European Convention on Human Rights, article 4(1)
Protection of women from forced labour	<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights, article 8(3) • American Convention on Human Rights, article 6(2) • European Convention on Human Rights, article 4(2) • Such practices are further outlawed by the ILO Forced Labour Convention, 1930 (No. 29) and the ILO Abolition of Forced Labour Convention, 1957 (No. 105)
Prohibition of trafficking	<ul style="list-style-type: none"> • Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, article 1 • Convention on the Elimination of Discrimination Against Women, article 6

APPENDIX 3

SUMMARY RESPONSES TO 1993 HAGUE

INTER-COUNTRY ADOPTION CONVENTION

Summary of Responses to Questionnaire on the abduction, sale of, or traffic in children, and some aspects of the practical operation of the 1993 Hague Inter-country Adoption Convention (Prel. Doc. No 4 of April 2010)

26. Surrogacy and inter-country adoption

Have you experienced any problems concerning the interplay between the 1993 Hague Convention and cross-border surrogacy arrangements?

State Party	Response to Question 26
Albania	No
Andorra	-
Armenia	The Republic of Armenia' legislation on cross-border surrogacy is not regulated. The exchange of experience from those countries who implement these provisions is needed.
Australia	Cross-border surrogacy arrangements are treated as either a citizenship and/or immigration matter in Australia and are not considered to have any direct interplay with the 1993 Hague Convention. There is an indirect relationship in that while inter-country adoption is highly regulated and supervised, there is little regulation of surrogacy arrangements other than provided by the country of origin and the need to meet either citizenship and/or immigration requirements.
Austria	No. According to Austrian law it is always the woman who gave birth to the child who is the mother. No surrogacy arrangements are valid. Thus there is no way to substitute adoption proceedings by surrogacy arrangements as far as Austrian law applies.
Belarus	There is no information concerning the interplay between the 1993 Hague Convention and cross-border surrogacy arrangements.
Belgium	No
Burkina Faso	No
Burundi	Not yet
Canada	<ul style="list-style-type: none">GOVERNMENT OF CANADA (Department of Citizenship, Immigration, and Multiculturalism Canada) This is an area in which we have recently begun to see cases. They do have the potential to be more complex because the practices with respect to surrogacy differ among countries. In some countries

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

State Party	Response to Question 26
	<p>the birth certificate bears the names of the persons who will parent the child as opposed to the surrogate (birth) mother.</p> <ul style="list-style-type: none"> • BRITISH COLUMBIA ('BC') There has been at least one situation in BC involving surrogacy and inter-country adoption queries. It is an area that has the potential to be extremely complicated • ALBERTA Yes • SASKATCHEWAN, NOVA SCOTIA, PRINCE EDWARD ISLAND, and NORTHWEST TERRITORIES No.
Chile	No. Si bien durante la vigencia del Convenio se conoció en nuestro país un caso de maternidad subrogada con Alemania, a través de la coordinación establecida con la Autoridad Central del citado país se pudo establecer que la madre, de nacionalidad y residencia chilena, había viajado a Alemania, realizando en dicho país una entrega directa de su hija a un matrimonio alemán, una vez nacida, ante un Notario Público, negando las partes, ante la intervención de la autoridad, que se hubiese hecho con fines de adopción.
China (People's Republic), Hong Kong SAR and Macao SAR	-
Colombia	En Colombia este tema aún no se encuentra regulado.
Cyprus	We are not aware of any problems between the Hague Convention and cross-border surrogacy arrangements.
Czech Republic	N/A
Denmark	We do very much agree with the raised concerns in the Deputy Secretary General's letter of 9 February 2010 about International Surrogacy Arrangements.
Ecuador	No hemos tenido ningún problema.
Finland	Surrogacy is prohibited in Finland. According to the Act on Assisted Fertility Treatments (1237/2006), assisted fertility treatment may not be provided if there is a reason to presume that the child will be given up for adoption.
France	Les difficultés se posent notamment au niveau de la reconnaissance en France de la filiation, telle qu'énoncée dans les actes d'état civil établis à l'étranger.
Georgia	In Georgia, a child born by the surrogate parent is considered to be a genetic child of the donor, the names of the donors are written in the birth certificate of the child and such cases are not connected to the adoption procedures.
Germany	Yes, Germany has experiences with the application of THC-93 to cross-border surrogacy arrangements: In a recent case, two siblings were born to an Indian surrogate mother who has been commissioned by a German couple. The German man is genetically related to the two children, the German woman not. The eggs were donated by an anonymous woman. After the birth of the children in India, the German couple applied for a visa at the German Embassy on the basis of the man's recognition of paternity. The Embassy denied the visa due to violation of the German ordre public.

APPENDIX 3 SUMMARY RESPONSES TO 1993 HAGUE INTER-COUNTRY ADOPTION
CONVENTION

State Party	Response to Question 26
	<p>The genetic (but from the German point of view not legal) father was forced to stay with the children in India for more than 2 years. Then, the Indian Supreme Court decided that an inter-country adoption procedure shall be introduced in order to enable the children the immigration to Germany. Therefore, CARA asked the German Federal Central Authority for cooperation according to the Hague Convention. The Bavarian Regional Central Authority principally agreed to cooperate with CARA under the condition that the genetic father is eligible and suitable to adopt the children. The children will now probably be able to enter Germany. In our opinion, it is contrary to the Convention's principles if the application of the Convention finally helps to arrange the legal disorder which was generated due to a commercial surrogacy arrangement which is as such in opposition to the German <i>ordre public</i>. The application of the inter-country adoption in these cases might be doubtful as contrary to the following Convention's principles: For example, according to Article 4 lit. c no. 3 and no. 4 THC-93, one major condition for the child's adoptability is that the required consents have not been induced by payment or compensation of any kind and that they must be given after the child's birth. Furthermore, Article 29 cannot be observed. Article 17 requires a couple of procedural conditions before the child is entrusted to the prospective adoptive parents. In cases of surrogacy arrangements, though, the entrustment to the intending parents takes usually already place after giving birth to the child. Furthermore, it is doubtful how the principle of subsidiarity can be observed (Article 4 lit. b THC-93). More general, according to Article 8 the Central Authorities have to cooperate and shall take all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.</p> <p>Germany would appreciate to find a solution for the children stuck in legal limbo as described above. However, it seems to be doubtful if THC-93 is always the appropriate way out.</p>
Greece	-
Guatemala	En Guatemala esta practica no es permitida por la ley.
Hungary	No
Italy	No
Latvia	There has been one case when the request for adoption from foreign citizen whose child was delivered by surrogate mother. The Latvian legislation forbids surrogacy. The adoption procedure does provide advantages for an adoption in these kinds of cases; hence this request was not satisfied. This case has not been resolved in the country of person's citizenship, too (no adoption, no recognition of motherhood).
Lithuania	N/A
Malta	N/A
Mexico	La maternidad subrogada no esta permitida en nuestro pais, solo existe una iniciativa de ley en el Distrito Federal que contempla dicha figura sin que a la fecha se haya aprobado.
New Zealand	New Zealand has experienced issues with the potential applicability of the Hague Convention to cases of international surrogacy. This is largely due to the fact that under New Zealand law, the legal parents of a child born as a result of a surrogacy arrangement are the surrogate mother and her partner (if any).

State Party	Response to Question 26
	<p>Unless adopted by the intended parents, a child born in such circumstances will not be eligible for New Zealand citizenship by descent and the intended parents are not the legal parents of the child.</p> <p>In addition, where an adoption is proposed, the potential applicability of the Hague Convention has resulted in difficulties for intended parents who want to bring a child back to New Zealand prior to an adoption order being made (or without the approval of both relevant Central Authorities to an inter-country adoption under the Convention).</p> <p>The NZCA also notes that different Central Authorities have differing views on the need for compliance with the Hague Convention for children born in its country by way of a surrogacy arrangement.</p> <p>It is difficult to apply the Hague Convention to international surrogacy cases as the Convention was not drafted with such situations in mind. However the potential issues within international surrogacy arrangements are paralleled with inter-country adoption and include the potential for exploitation of women, the commercial nature of the arrangements, identity issues for the child, the possibility of improper movement of children, and potential statelessness issues for a child born through an international surrogacy arrangement.</p>
Norway	Yes, we have, and we fully agree in the views presented by the Hague Conference in the letter of 9 February 2010 to the Ministry of Justice of New Zealand concerning the applicability of the 1993 HC in these cases.
Panama	En Panama no esta permitida la maternidad subrogada. Nuestra Ley prohíbe a las madres dar en adopción durante el embarazo. Tampoco se permite en Panama los 'vientres de alquiler'.
Peru	Nuestra normativa no permite la maternidad subrogada transfronteriza, de ser realizada es ilegal y sancionada.
Philippines	N/A
Portugal	No
Romania	-
Slovakia	No, surrogacy is not permitted in Slovakia.
Slovenia	-
South Africa	Chapter 19 of the Children's Act, Act 38 of 2005, deals with surrogate motherhood (sec 292). The agreement is entered into in SA. At least one of the intended parents must be domiciled in SA. Surrogate mother and partner to be domiciled in SA. Surrogate agreement is confirmed by Hugh Court in SA. These measures greatly reduce cross-border surrogacy.
Spain	Nuestra legislación no contempla la posibilidad de maternidad subrogada, estableciendo en el artículo 10.1 de la Ley 14/2006, de Técnicas de Reproducción Humana Asistida que será nulo de pleno derecho el contrato por el que se convenga la gestación, con o sin precio, a cargo de una mujer que renuncia a la filiación materna a favor del contratante o de un tercero.
Sri Lanka	No
Sweden	No, not yet
Switzerland	Certains doutes mais pas de cas avérés
United Kingdom of Great Britain and Northern Ireland	We are not aware of any problems between the Hague Convention on inter-country adoption and inter-country surrogacy from an immigration perspective.

APPENDIX 3 SUMMARY RESPONSES TO 1993 HAGUE INTER-COUNTRY ADOPTION
CONVENTION

State Party	Response to Question 26
United States of America	<p>One issue that has arisen in the area of Assisted Reproductive Technology (ART), which includes surrogacy, involves how to determine the legal relationship of the respective parties to the child born as a result of ART. In most cases, the law of the country in which the birth occurred would apply in determining the legal relationship of a surrogate mother and the prospective parents to the child. If the birth occurs in the United States, the legal relationships of the parties to the child would generally be determined by the law of the U.S. state in which the child was born. Confusion may arise in cases in which a surrogacy agreement is entered into according to the law of the U.S. State of residence of the surrogate mother, but the child is ultimately delivered in, or is subsequently transferred to, another U.S. State or foreign country which has different rules governing surrogacy.</p> <p>Another issue is whether and to what extent the Convention is relevant in the case of a child born to a surrogate in one Convention country and the intended parents wish to transfer the child to another Convention country. The USCA works with other Central Authorities to analyse such cases and reach an appropriate solution.</p>
Venezuela	<p>En la Oficina Nacional de Adopciones adscrita al IDENA no hemos tenido experiencia, hasta el momento, con problemas relacionados con compatibilidad entre el Convenio de La Haya de 1993 y los acuerdos de maternidad subrogada transfronterizos.</p>

The following States Parties to the Hague Conference on Private International Law did not answer questionnaire:

Brazil, Bulgaria, Costa Rica, Estonia, Iceland, India, Ireland, Israel, French, Mauritius, Monte Carlo, Netherlands, Paraguay, Poland, Russian Federation, FYR Macedonia, Turkey, Uruguay

APPENDIX 4

INTERVIEWS

Principal Research Countries/Jurisdictions	Practitioner	Academic
Belgium	-	J. Verhellen, Ghent University
France	C. Butruille-Cardew (CCBC Avocats)	-
Netherlands	K. Saarloos	G-R de Groot, Maastricht University S. Rutten, Maastricht University
Spain	-	Patricia Orejudo, University of Madrid
India	G. R. Hari, Partner, ISLC	
United Kingdom	A, Woorwood (Pennington Manches LLP) Peter Burgess (Burgess Mee)	-
California (USA)	Rich Vaughn of International Fertility Law Group, Inc. (attorneys)	-

Supplementary Research Countries/Jurisdictions	Practitioner
Australia	Rachel Oakley (Dwyer Durack)
Denmark	Louise Bøtcher Bomholtz (Bech-Brunn)

Interested Stakeholders	
HCCH	Hannah Baker (Legal Officer, HCCH) (comments in a personal capacity)
UNICEF	K Gregson (UNICEF, NY) and Jyothi Kanics (Child Protection – UNICEF, Geneva) and Erik Nyman (Gender and Human Rights Cluster – UNICEF, Geneva) (comments in a personal capacity)
University of Aberdeen: International Surrogacy Arrangements	Katarina Trimmings (Co-Project Leader with Paul Beaumont). Research sponsored by Nuffield Foundation
International Social Service (Geneva)	Marie Jenny and Stephanie Romanens Pythoud (comments in a personal capacity)

APPENDIX 5

VALORISATIONS RELATING TO THE DISSERTATION

‘The Status of Children arising from Inter-Country Surrogacy Arrangements: the Past, the Present, the Future’

by Michael Wells-Greco - 1 October 2015

1. The societal relevance of this thesis

Given the complexity of the legal issues involved, the growing number of cases and research literature attest to the topicality of surrogacy. And while the topic of surrogacy has grown in judicial, political and public discourse in recent years, the matter of Baby Gammy reported in the media in August 2014 (child born in Thailand to a surrogate who was allegedly abandoned by his Australian intending parents because he has Down’s syndrome) led to a media and public outcry. Surrogacy, as a research topic, is receiving significant interest in the public domain.

To build upon the research in this fast-evolving subject-matter this thesis provides a timely multi-disciplinary legal approach to address the normative gaps in the existing research literature. This research provides an analysis of the specific problems arising from inter-country surrogacy arrangements with a focus on the most prevalent civil status (parentage, nationality and birth registration) and human rights (identity, continuation of relationship rights and child protection) issues relating to surrogacy. The research is interested in what decision makers do to resolve cases of inter-country surrogacy; that is, it examines what factors courts and national authorities are considering in coming to their decisions and how and why they framed their decisions in the way that they did.

The research examines inter-country surrogacy arrangements through the prism of European and international human rights. It is considered that there is a child’s rights imperative and such an approach requires understanding of the ways in which human rights violations may arise throughout the surrogacy process and of the ways in which states’ obligations under international human rights law are to be implemented. It also considers and examines the comments to date of the Human Rights Committee and the Committee on the Rights of the Child. Concrete measures states must take to assure the identified rights and standards are met. There is another reason to consider these human rights aspects in that such a review informs the debate on the application of any public policy exception in cases of inter-country surrogacy which, as considered, is often very

relevant for many states in establishing or recognising a parental status. This analysis is particularly timely for European states given the recent judgments of the European Court of Human Rights in *Paradiso and Campanelli v Italy* (Application No. 25358/12), *Mennesson v France* (Application No. 65192/11) and *Labassee v France* (Application No. 65941/11). In *Mennesson* and *Labassee* the Court held that the surrogate-born children have a right, framed in the context of a right to identity (an aspect of private life), to establish legal filiation with respect to their (genetic) father. These are very significant judgments with significant scopes of application across the Contracting States to the European Convention on Human Rights.

The research responds to the realities of inter-country surrogacy and explores workable soft law and hard law solutions to the problems presented by surrogacy cases together with possible types of regulation of surrogacy arrangements to minimise risks to children and the types of abuses that may occur. Given the differing approaches to the legal issues concerning surrogacy, this research explores whether and to what extent, coordinated soft law approaches - recommendations with common minimum standards and/or principles - are more likely to be found feasible as a first step. This is a first for this subject-matter.

The aims of this research and the answers to the leading questions – addressing whether natural laws on parenthood and nationality for surrogate born children to protect their interests – contributes to the fulfilment of the rights of children. It is meant to, and will strengthen their position. This is not only of importance to these children and their families but also to the state as a whole. Furthermore, this research is of importance for legal practitioners, registrars, notaries, the judiciary, lawyers, legislators and policy makers, and other legal professionals. It provides them with more detailed knowledge of and insights into the gaps in order to provide a narrative framework for these children, and more broadly, the state. With the study of the content of the key children's rights issues, this research fills a gap in legal practice. Legal practitioners will also gain a clear insight into policies and their consequences. The research will provide European legislators and governments with useful tools regarding their policies. The debate about and study on legal diversity thus also contributes to the development of the discipline of PIL and children's rights.

Reference is made to the introduction of this research, in which the topicality of the civil status issues for surrogate-born children is discussed in more detail.

2. Target groups for the research results

This thesis may serve various purposes.

First, it may add value in relation to the on-going debate concerning surrogacy. Such work is important given the rate at which questions about the parentage and nationality of

children conceived through surrogacy are seemingly being put to judges, legislators and national authorities. It is hoped that this discussion is pertinent to all readers engaged with family law questions, given that the topic under consideration – that is, parentage and nationality through surrogacy – transcends jurisdictional boundaries.

Second, it may provide inspiration for the national and international debates concerning how to respond to surrogacy and, in particular, the consideration of the rights of the child and the adult parties that are implicated in inter-country surrogacy arrangements. The research results address in part national policy makers in the form of suggesting specific law reform. In this political context, they can become relevant in the current debate on children's rights. This research fills a gap in legal practice.

Third, the research results as developed in the final chapter are addressed to national authorities and judges when they are called upon to decide on questions resulting from surrogacy. They are directed towards equipping the courts with legal arguments that they can make use of in their decision-making and, in so doing, in developing the law further and refining an understanding of public policy. This review should help lawyers, judges, and human rights observers better understand the impact of surrogacy on domestic law. It is hoped that readers of this thesis will be encouraged to raise arguments that are grounded in international and comparative law in their domestic courts and that courts will find the experiences of other courts relevant.

Fourth, this thesis would appear to be of interest to the Human Rights Council, the CEDAW Committee, the Committee on the Rights of the Child, the UN Children's Fund, the UNHCR and the International Commission on Civil Status. The research results may also be of particular interest for the Hague Conference on Private International Law. The legal policy recommendations that are developed in this research supplements the ongoing research of the Hague Conference.

Lastly, it is hoped that the discussion and the research results are of interest to intending parents, surrogates and the children born of surrogacy arrangements.

3. The innovative character of the research results

As set out above, this thesis and its research results are innovative because they develop the existing research on inter-country surrogacy in order to fill identified normative gaps. This research is of the private international law and public international law fields: it considers not only relevant private law questions to these children and their families but places the answers to these and other questions in the context of states' obligations under European and international human rights law in the context of parenthood and birth-right nationality. This has necessitated a mix of methodological approaches involving a combined library-based and empirical study and a legal dogmatic analysis of the relevant national and international laws.

An examination of the current international children's rights movement from the child's point of view, however, reveals considerable schisms between international principles and the status of surrogate-born children. This research directly examines the complex issues involved in defining and understanding the rights of surrogate-born children. The analysis of formal international law relating to the rights of the child is invaluable and would stand on its own. The text, however, does more than detail the rights of children in international law as enshrined in European and international documents; it also explores how other international fora and different countries are struggling with children's rights in this field, both in theory and in practice.

4. Concrete products, services, processes and activities into which the research results will be translated and shaped

Reference is given to Chapter Six of this thesis. The aims of this research are to establish whether national laws on parenthood and the establishment of a nationality sufficiently protect the interests of the surrogate-born child and the parties to a surrogacy arrangement. Broadly, it has been established that state and international 'soft law' action is needed in parallel. It is accepted that an international 'hard law' approach may also be needed; such an approach will be best formulated, however, when individual countries have formed their own views, and are in a position to pool knowledge and experience.

The question of how the law should change in order to appropriately respond is set out in the form of specific legal policy recommendations. These policy recommendations are framed as guidance tools for courts in their decision-making and suggestions for policy makers in the debate on what laws to adopt. This research will to be made available to:

- any Experts' Group formed by the Hague Conference on Private International Law, which it is hoped will be mandated to facilitate further exploration of the feasibility of a binding multilateral instrument (or possible non-binding measures) in the field of surrogacy.
- to the UNHCR to assist with its consideration of the prevention of statelessness and the attribution of nationality for surrogate-born children.
- national commissions mandated to examine the issues associated with legal parenthood, multiple parenthood, multiple parental responsibility and surrogate motherhood. For example, the commission set up in the Netherlands is expected to publish its findings on 1 March 2016.

The research is also presented at fora of lawyers, including, *inter alia*, the International Academy of Matrimonial Lawyers.

30 April 2015

APPENDIX 6

ABSTRACT

With reference to a comparative review of eight legal systems, the overarching purpose of this thesis is to examine the legal aspects of parenthood and nationality following inter-country surrogacy arrangements and the influence of European and international human rights law on the determination of parentage, the establishment of nationality, and the prevention of statelessness as well as identity rights, continuation of relationship rights, and, more broadly, child protection. The aims of this research are to establish whether national laws on parenthood and the establishment of nationality sufficiently protect the interests of the surrogate-born child and the parties to a surrogacy arrangement in accordance with identifiable standards under European and international human rights law. The research is interested in what decision makers do to resolve cases of inter-country surrogacy; that is, it examines what factors courts and national authorities are considering in coming to their decisions and how and why they framed their decisions in the way that they did.

This research starts from the premise that it cannot be in the best interests of children born by way of surrogacy to leave their important relationships of care outside of a legal framework of rights and responsibilities. A balance is needed, placing the best interests of the child as a primary consideration, but also respecting the balance that must be achieved between children, intending parents, the surrogate, gamete providers, and the state. The challenge is to ensure that all children enjoy human rights equally (rights to a nationality, an identity, and to establish family relationships) irrespective of a child's method of conception and birth while, at the same time, realising these rights within a child protection framework. Asking for good reasons why, in concrete cases, children raised in these families should enjoy lesser protection of their family rights seems a more child-centred approach to adopt.

The research examines inter-country surrogacy arrangements through the prism of European and international human rights. It is considered that there is a child's rights imperative and such an approach requires understanding of the ways in which human rights violations may arise throughout the surrogacy process and of the ways in which states' obligations under international human rights law are to be implemented. It also considers and examines the comments to date of the Human Rights Committee and the Committee on the Rights of the Child. States must take concrete measures to assure the identified rights and standards are met. There is another reason to consider these human rights aspects in that such a review informs the debate on the application of any public

policy exception in cases of inter-country surrogacy which, as considered, is often very relevant for many states in establishing or recognising a parental status established abroad. This analysis is particularly timely for European states given the recent judgments of the European Court of Human Rights in *Paradiso and Campanelli v. Italy* (Application No. 25358/12), *Mennesson v. France* (Application No. 65192/11) and *Labassee v. France* (Application No. 65941/11). In *Mennesson* and *Labassee* the Court held that these children have a right, framed in the context of a right to identity (an aspect of private life), to establish legal filiation with respect to their (genetic) father. These are very significant judgments with significant scopes of application across the Contracting States to the European Convention on Human Rights.

Workable soft law and hard law solutions as possible types of regulation of surrogacy arrangements are explored. Given the differing approaches to the legal issues concerning surrogacy, this thesis explores the necessity and suitability of soft law approaches; a framework for recommended principles and guidelines is presented. The development of principles and guidelines is in response to the clear need for practical, human rights based policy guidance and to encourage states, national and regional courts, intergovernmental organisations, and human-rights treaty bodies to make use of them. The content of these principles and guidelines is provided together with state-directed recommendations.

The main research for this thesis was concluded on Universal Children's Day on 20 November 2014 – a day of celebration – and more so in 2014 as it marked the 25th anniversary of the adoption of the UN Convention on the Rights of the Child. The anniversary of that Convention reminds us that it is an evolving document which, as children's rights advocates, states have a responsibility to keep re-reading to ask how it applies to new questions facing children. It is hoped that this thesis is reading not only for researchers and students in the field of family and children's rights, but also for all those interested in cross-border phenomena.

It is not possible that a thesis concerning such a sensitive topic should be equally well received in all quarters, given some of the controversial issues considered. There is bound to be criticism that this thesis has gone too far, or not far enough.

Keywords: citizenship, surrogacy, surrogate motherhood, statelessness, parenthood, parentage, legal parenthood, identity, nationality, private international law, international law, international human rights law, public policy, women's rights, and rights of the child.

APPENDIX 7

BIBLIOGRAPHY AND LITERATURE

BOOKS AND ARTICLES

O. van den Akker, 'The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK' [2000] 15(8) Human Reproduction 1849

J. Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' [2013] 7 Albany Government Law Review 111

M. Antokolskaia, 'Legal Embedding Planned Lesbian Parentage. Pouring New Wine into Old Wineskins?' [2014] Familie & Recht (electronic publication)

E. Anderson, 'Commodification and Commercial Surrogacy' [1992] Philosophy and Public Affairs 132

E. Anderson, *Values in Ethics and Economics* (Harvard University Press 1993)

E. Anderson, 'Is Women's Labour a Commodity?' [1990] 19(1) Philosophy and Public Affairs 71

L. Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' [1995] 81 Virginia Law Review 2305

A. Bainham, 'What is the Point of Birth Registration?' [2008] 20 Child and Family Law Quarterly 449

H. Baker, 'A Possible Future Instrument on International Surrogacy Arrangements: Are there "Lessons" to be Learnt from the 1993 Hague Inter-country Adoption Convention?' in P. Beaumont and K. Trimmings (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013) 411

R. Baratta, 'Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC' [2007] 27(4) Praxis Des Internationalen Privat-Und Verfahrensrechts 6

- R. Baratta, 'La reconnaissance internationale des situations juridiques personnelles et familiales', *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers, 2011), 256
- C. Batchelor, 'Stateless Persons: Some Gaps in International Protection' [1995] 7 *International Journal of Refugee Law* 232
- C. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' [1998] *International Journal of Refugee Law* 156
- H. Batiffol and P. Lagarde, 'L'improvisation de nouvelles règles de conflit de lois en matière de filiation', [1972] 61(1) *Revue critique de droit international privé* 3
- H. Beate Schopp-Schilling and C. Flinterman, 'The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women' (Mariam K. Chamberlain Series on Social and Economic Justice) (The Feminist Press 2007)
- P. Beaumont and K. Trimmings, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' [2011] 7(3) *Journal of Private International Law* 627
- P. Beaumont and K. Trimmings (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013)
- L. Bednall, 'Family: Distant Relatives' [2011] *The New Law Journal* 1433
- L. Besselink, 'Should the European Union ratify the European Convention on Human Rights? Some Remarks on the relations between the European Court of Human Rights and the European Court of Justice' in A. Føllesdal, B. Peters, and G. Ulfstein, *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013)
- A. Bianchi, 'Human Rights and the Magic of Jus Cogens' [2008] 19(3) *European Journal of International Law* 491
- J. Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law' [1998] 19 *Michigan Journal of International Law* 1141

J. Blom, 'Public Policy in Private International Law and Its Evolution in Time' [2003] 50(3) Netherlands International Law Review 373

G. van Bueren, *Child Rights in Europe* (Council of Europe, Strasbourg 2007)

G. van Bueren, *International Law on the Rights of the Child* (Kluwer, Amsterdam 1998)

G. van Bueren, 'Acknowledging Children as International Citizens: A Child Sensitive Communications Mechanism for the Convention on the Rights of the Child' in A. Invernizzi and J. Williams (eds.) *The Human Rights of Children* (Ashgate Publishing 2011)

G. van Bueren, 'Children's Access to Adoption Records: State Discretion or an Enforceable International Right?' [1995] 58(1) Modern Law Review 48

E. Blyth and A. Farrand, 'Reproductive Tourism: A Price Worth Paying for Reproductive Autonomy?' [2005] 25 Critical Social Policy 91

E. Blyth and L. Frith, 'Donor-Conceived People's Access to Genetic and Biological History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity' [2009] 23 International Journal for Law, Policy and the Family 174

E. Blyth, 'Fertility Patients' Experiences of Cross-Border Reproductive Care' [2010] 94(1) Fertility and Sterility 11

E. Blyth, 'Not a Primrose Path: Commissioning Parents Experiences of Surrogacy Arrangements in Britain' [1995] 13 Journal of Infant Reproductive Psychology 185

K. Boele-Woelki, 'Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe' [2000] 6 Louisiana Law Review 1053

K. Boele-Woelki, 'The Principles of European Family Law: Its Aims and Prospects' [2005] 1(2) Utrecht Law Review 160

K. Boele-Woelki, 'The European Agenda: An Overview of the Current Situation in the Field of Private International Law and Substantive Law' [2006] International Family Law 149

K. Boele-Woelki (et al.), *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007)

K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Intersentia 2008)

K. Boele-Woelki, I. Curry-Sumner, and M. Vonk, 'Draagmoederschap en illegale opnemings van kinderen' (Surrogacy and illegal placement of children) [2011] Utrecht Centre for European Research into Family Law

K. Boele-Woelki, 'Cross-Border Surrogate Motherhood: We Need to Take Action Now!' in *A Commitment to Private International Law: Essays in Honour of Hans van Loon / Permanent Bureau of the Hague Conference on Private International Law* (Intersentia 2013) 47

S. Boyd, 'Gendered Legal Parenthood: Bio-genetic Ties, Intentionality and Responsibility' [2007] 25 Windsor Yearbook of Access to Justice 55

L. Brilmayer, 'Interstate Pre-emption: The Right to Travel, the Right to Life, and the Right to Die' [1993] 91 Michigan Law Review 873

I. Brownlie, *Principles of Public International Law* (7th ed. Oxford, OUP 2008)

P. Brinsden, T. Appleton, E. Murray (et al.), 'Treatment by In Vitro Fertilisation with Surrogacy: Experience of One British Centre' [2000] British Medical Journal 924

L. Brunet (et al.), 'A Comparative Study on the Regime of Surrogacy in EU Member States' (2013) PE 474.403. European Parliament, Brussels

A. Campbell, 'Conceiving Parents through Law' [2007] 21 International Journal of Law, Policy and the Family 242

C. Campiglio, 'Lo stato di figlio nato da contratto internazionale di maternità' [2009] Rivista di diritto internazionale privato e processuale 589

N. Cantwell, *The Best Interests of the Child in Intercountry Adoption* (Innocenti Insight. Florence: UNICEF Office of Research 2014)

J. Carbone and N. Cahn, 'Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty' [2003] 11 William & Mary Bill of Rights Journal 1011

M. Carnelley and S. Soni, 'A Tale of Two Mummies: Providing a Womb in South Africa: Surrogacy, the Agreement and the Legal Rights of the Parents within the Children's Act 38 of 2005. A Brief Comparative Study with the United Kingdom' [2008] 11 *Speculum Juris* 36

A. Cassese, *International Law* (OUP, Oxford 2001)

M. Catto, 'La gestation pour autrui: d'un problème d'ordre public au conflit d'intérêts ?' [2013] 3 *Revue des droits de l'homme* 102

C. Charles, 'La continuité du traitement des situations juridiques internationales : vers une rupture méthodologique' in G. Koubi (et al.) *La notion de continuité, des faits au droit* (Paris 2011)

W. Chavkin and J. Maher (eds.), *The Globalization of Motherhood – Deconstructions and Reconstructions of Biology and Care* (London/New York Routledge 2010)

J. Collins, 'Cross-border Reproductive Care: Now and into the Future' [2010] 94 *Fertility and Sterility* 25

C. Collins and D. Weissbrodt, 'The Human Rights of Stateless Persons' [2006] 28 *Human Rights Quarterly* 245

K. Condie, 'Surrogacy as Treatment for Infertility' [1986] 31 *Journal of Law Society of Scotland* 469

E. Cornut, 'Forum shopping et abus du choix de for en droit international privé' [2007] 134 *Journal de Droit International* 27

M. Crawshaw, E. Blyth, and O. van den Akker, 'The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice' [2013] *Journal of Social Welfare and Family Law* 265

L. Culley, N. Hudson, F. Rapport, E. Blyth, W. Norton, and A. Pacey, 'Crossing Borders for Fertility Treatment: Motivations, Destinations and Outcomes of UK Fertility Travellers' [2011] 21 *Human Reproduction* 2373

I. Curry-Sumner and M. Vonk, 'National and International Surrogacy: An Odyssey' in B. Atkins (eds.), *The International Survey of Family Law* (Bristol, Family Law 2011) 272

- I. Curry-Sumner and M. Vonk, 'It All Depends on Who You Ask: Dutch Parentage Law In Four Acts' in B. Atkins (ed.), *The International Survey of Family Law* (Bristol, Family Law 2011) 329
- D. Cutas and S. Chan (eds.), *Families – Beyond the Nuclear Ideal* (Bloomsbury Academic 2012).
- D. Cutas and L. Bortolotti, 'Natural Versus Assisted Reproduction: In Search of Fairness' [2010] 4(1) *Studies in Ethics, Law, and Technology* 14
- J. Damelio and K. Sorensen, 'Enhancing Autonomy in Paid Surrogacy' [2008] 22 *Bioethics* 269
- M. Darnovsky, 'Forum on Cross-Border Surrogacy, Adoption Attracts Scholars, Human Rights Activists and Policymakers', *Our Bodies Our Blog* 18 September 2014
- S. DasGupta and S. Das DasGupta (eds.), *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014)
- R. Deech, 'Reproductive Tourism in Europe: Infertility and Human Rights' [2003] 9 *Global Governance* 425
- D. Deomampo, 'Beyond "Wombs for Rent": Indian Surrogates and the Need for Evidence-Based Policy', *Somatosphere* 5 June 2014
- J. Doek, 'The CRC and the Right to Acquire and to Preserve a Nationality' [2006] 25(3) *Refugee Survey Quarterly* 26
- A. Dohle, 'Inside Story of an Adoption Scandal' [2008] 39(1) *Cumberland Law Review* 131
- J. Dolgin, 'The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond' [1994] 26(4) *Connecticut Law Review* 1261
- J. Dolgin, 'Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate' [1990] 38 *Buffalo Human Rights Law Review* 515

- J. Douglas, 'Marriage, Cohabitation, and Parenthood – from Contract to Status?' in S. Katz, J. Eekelaar, and M. Maclean (eds.), *Cross Currents. Family Law and Policy in the US and England* (Oxford University Press 2000) 223
- K. Drabiak (et al.), 'Ethics, Law and Commercial Surrogacy: A Call for Uniformity' [2007] 35 *Journal of Law, Medicine and Ethics* 300
- W. Duncan, 'Future Developments in International Family Law with Special Emphasis on Cross-Border Child Protection: A View from The Hague' [2010] *Liber Amicorum Kurt Siehr* 221
- R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977)
- K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] *Public Law* 534
- D. Eames, 'Maintenance Enforcement: The 2007 Hague Convention and the EC Regulation' [2009] *International Family Law* 47
- J. Eekelaar and R. Dingwall, *Human Rights: Report on the Replies of Governments to the Enquiry under Article 57 of the European Convention on Human Rights* (1987, Council of Europe) 17.
- M. Engel, 'Cross-Border Surrogacy: Time for a Convention?' in Dethloff (eds.), *Family Law and Culture in Europe: Developments, Challenges and Opportunities; Proceedings of the Fifth Conference of the Commission on European Family Law* (Intersentia 2014)
- I. Engeli, 'The Challenges of Abortion and Assisted Reproductive Technologies Policies in Europe' [2009] 7 *Comparative European Politics* 56
- H. Englert and J. Verhellen, 'L'établissement et la contestation de paternité dans le nouveau Code de droit international privé: réflexions sur le conflit de filiation' [2006] *Revue du droit des étrangers* 224
- Y. Ergas, 'Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy' [2013] *Emory International Law Review* 117
- Y. Ergas, 'Thinking "Through" Human Rights: the Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy' in P. Beaumont

and K. Trimmings (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013) 427

M. Ertman, 'What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification' [2003] 82 North Carolina Law Review 1

A. Estin, 'Families across Borders' [2010] Florida Law Review 47

J. Ezeilo, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children' [2012] HRC/20/18/Add.2

J. Fawcett and J. Carruthers, *Private International Law* (Cheshire, North & Fawcett 2008)

R. Fenton, S. Heenan and J. Rees, 'Finally Fit for Purpose? The Human Fertilisation and Embryology Act 2008' [2010] 32 Journal of Social Welfare and Family Law 275

C. Fenton-Glynn, *Children's Rights in Intercountry Adoption: A European Perspective* (Intersentia 2014)

C. Forder and K. Saarloos, 'The Establishment of Parenthood: A Story of Successful Convergence?' Maastricht Faculty of Law Working Paper No. 2007-01

J. Fortin, *Children's Rights and the Developing Law* (2nd ed. Butterworths 2003)

J. Fortin, 'Children's Right to Know Their Origins - Too Far, Too Fast?' [2009] 21 CFLQ 336

P. Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' [2011] 5(3) Diritti Umani e Diritto Internazionale

M. Freeman, 'Does Surrogacy Have a Future after Brazier?' [1999] 7 Medical Law Review 1

M. Freeman, 'Is Surrogacy Exploitative?' in S. McLean (eds.), *Legal Issues in Human Reproduction* (Gower 1989) 164

M. Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' [1996] 4 International Journal of Children's Rights 273

- M. Freeman, *Understanding Family Law* (Sweet & Maxwell 2007)
- M. Freeman, 'After Warnock - Whither the Law?' [1986] 49 *Current Legal Problems* 33
- N. Gamble and L. Ghevaert, 'The Chosen Middle Ground: England, Surrogacy Law and the International Arena' [2009] *International Family Law* 223
- N. Gamble and L. Ghevaert, 'International Surrogacy: Payments, Public Policy and Media Hype' [2011] 41 *Family Law* 504
- N. Gamble, 'Should Surrogate Mothers Still Have an Absolute Right to Change Their Minds?' [2012] *BioNews* 678
- L. Gannage, 'L'ordre Public International À l'épreuve Du Relativisme Des Valeurs' [2009] *Travaux du Comité Français de Droit International Privé: Années 2006-2008*
- J. Gerards, 'Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights' in M. Claes and M. De Visser (eds.), *Constructing European Constitutional Law* (Oxford, Hart 2014)
- A. Gibson (et al.), 'Assisted Reproductive Technology and Inheritance Law: Differing Jurisdictional Approaches to Determining Heirship in the World of Modern Reproduction' [2013] 19(2) *Trusts & Trustees* 190
- I. Glenn Cohen, 'Regulating Reproduction: The Problem with Best Interests' [2011] 96 *Minnesota Law Review* 423
- S. Golombok, F. MacCallum, C. Murray, E. Lycett, and V. Jadva, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' [2006] 47 *Journal of Child Psychology and Psychiatry* 213
- S. Greer, 'The interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' [2000] *UCL Human Rights Review* 1
- G. de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge 2014) 144

G. de Groot, 'Strengthening the Position of Children: Council of Europe's Recommendation (2009) 13' in *E Hofi di Ley* (Boom Juridische uitgevers Den Haag 2014)

D. Gruenbaum, 'Foreign Surrogate Motherhood' [2011] 60 *American Journal of Comparative Law* 475

Z. Gürtin-Broadbent, 'Unpacking Cross-Border Reproductive Care' *BioNews* 584 (15 November 2010)

S. Guy, 'Rights to Maternity Leave Granted to Parents through Surrogacy' [2012] *BioNews* 683

B. Hale, 'Argentorum Locutum: Is the Strasbourg or the Supreme Court Supreme?' [2012] *Human Rights Law Review* 65

B. Hale, 'What are the Limits to the Evolutive Interpretation of the Convention?' *Dialogue between judges, European Court of Human Rights, Council of Europe* (2011)

M. Harding, *Conflicts of Law* (Routledge 2013)

A. Hatzis, 'From Soft to Hard Paternalism and Back: The Regulation of Surrogate Motherhood in Greece' [2009] *Portuguese Economic Journal* 8

A. Hatzis, 'Just the Oven: Law and Economics Approach to Gestational Surrogacy Agreements' in K. Boele-Woelki, *Perspectives for the Unification or Harmonisation of Family Law in Europe* (Antwerp: Intersentia 2003)

M. Henaghan, 'International Surrogacy Trends: How Family Law is Coping' [2014] 8 *Australian Journal of Adoption* 9

J. Herbie DiFonzo and R. Stern, 'The Children of Baby M' [2011] 39 *Capital University Law Review* 345

J. Herring, F. Ebtehaj, and M. Johnson, *Birth Rites and Rights* (Hart Publishing 2011)

J. Hill, 'What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' [1991] 66 *North-Western University Law Review* 353

- E. Hisano, 'Gestational Surrogacy Maternity Disputes: Refocusing on the Child' [2011] 15 Lewis and Clark Law Review 517
- L. Hodson, 'The Rights of Children Raised in Lesbian, Gay, Bisexual, or Transgender Families: A European Perspective' [2009] ILGA Europe
- L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' [2012] International Journal of Children's Rights 501
- R. Holtmaat and J. Naber, *Women's Human Rights and Culture* (Cambridge, Intersentia 2011)
- K. Horsey and S. Sheldon, 'Still Hazy after All These Years: the Law Regulating Surrogacy' [2012] 20 Medical Law Review 67
- K. Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' [2010] 22(4) Child and Family Law Quarterly 449
- D. Howe, 'International Surrogacy: A Cautionary Tale' [2008] 38 Family Law Journal 61
- A. Hutchinson, 'International Surrogacy Arrangements: Time for a Multi-Lateral Convention' [2011] International Family Law 303
- M. Inhorn and P. Patrizio, 'Reproductive Tourism as Reproductive Exile' [2009] 92 Fertility and Sterility 904
- M. Inhorn and P. Patrizio, 'ART Practice and Tourism' in J.G. Schenke, *Assisted Reproductive Technologies* (Cambridge University Press 2011)
- Iona Institute, *The Ethical Case against Surrogate Motherhood: What We Can Learn from the Law of Other European Countries* (Dublin, Iona Institute 2012)
- E. Jackson, *Medical Law. Text, Cases and Materials* (Oxford University Press 2010)
- E. Jackson, 'What is a Parent?' in A. Diduck and K. O'Donovan *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish 2006)

V. Jadvā, L. Blake, P. Casey and S. Golombok, 'Surrogacy Families 10 Years on: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' [2012] 27(10) Human Reproduction 3008

V. Jadvā, C. Murray, E. Lycett, F. MacCallum, and S. Golombok, 'Surrogacy: The Experiences of Surrogate Mothers' [2003] 18 Human Reproduction 2196

S. Jones, 'The Ethics of Inter-country Adoption: Why it Matters to Healthcare Providers and Bioethicists' [2010] 24(7) Bioethics 358

C. Kessedjian, 'Public Order in European Law' [2007] 1(1) Erasmus Law Review 25

U. Kilkelly, 'Article 8: The Right to Respect for Private and Family Life, Home and Correspondence' in Harris (et al.) (eds.), *Law of the European Convention on Human Rights* (Oxford 2009) 385

U. Kilkelly, *The Child and the ECHR* (Aldershot, Ashgate 1999)

U. Kilkelly, 'Children's Rights: a European Perspective' [2004] 4 Judicial Studies Institute Journal 68

U. Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' [2010] 61 Northern Ireland Legal Quarterly 245

P. Kinsch, 'Private International Law Topics before the European Court of Human Rights Selected Judgments and Decisions (2010-2011)' [2011] Yearbook of Private International Law 13

C. Koechle, 'Determination of Citizenship after (Supposed) Birth through Full Surrogacy in the Ukraine. Violation of Article 8 ECHR by not Taking into Account the Welfare of the Child' [2013] 7 Vienna Journal on International Constitutional Law 239

P. Lambert, 'La Cour européenne des droits de l'homme à l'épreuve de quelques critiques...au fil du temps' [2010] Revue trimestrielle des droits de l'homme 5

R. Leigh Cook (et al.) (eds.), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003)

- B. Lewis, 'Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes' [2010-2011] 49 *University of Louisville Law Review* 371
- T. Lin, 'Born Lost: Stateless Children in International Surrogacy Arrangements' [2013] 21 *Cardozo Journal of International and Comparative Law* 545
- P. Laufer-Ukeles, 'Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis' [2002] 9 *Duke Journal of Gender Law and Policy* 91
- C. London, 'Advancing a Surrogate Focused Model of Gestational Contracts' [2012] 18 *Cardozo Journal of Law and Gender* 391
- O. Lopes Pegna, 'L'incidenza dell'Articolo 6 della Convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere' [2011] *Rivista di diritto internazionale* 54
- M. Lotz, 'The Two-Parent Limitation in ART Parentage Law: Old-Fashioned Law for New-Fashioned Families' in D. Cutas and S. Chan, *Families: Beyond the Nuclear Ideal* (Bloomsbury Academic Press) 34
- N. Lowe, 'A Study into the Rights and Legal Status of Children Brought up in Various Forms of Marital and Non-marital Partnerships and Cohabitation' (10 March 2008) 5 CF-JA (2008) 3N. Lowe, *An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law* (Cardiff University 2006)
- B. Lurger, 'The Austrian Choice of Law Rules in Cases of Surrogate Motherhood Abroad – The Best Interest of the Child between Recognition, European Human Rights and the Austrian Prohibition of Surrogate Motherhood' [2013] *Praxis des Internationalen Privat- und Verfahrensrechts* 282
- F. Medjouba and J. Stefanelli, *The Rights and Responsibilities of Citizenship* (British Institute of International and Comparative Law 2008)
- Y. Margalit, O. Adam Levy, and J. Loike, 'The New Frontier of Advanced Reproductive Technology: Re-evaluating Modern Legal Parenthood' [2014] 37 *Harvard Journal of Law and Gender* 107
- J. Martin, 'Surrogate Motherhood and Children's Interests' [1990] 15(4) *Children Australia* 40

J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175

A. McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' [1999] 32 *Journal Vanderbilt Transnational Law* 271

J. Milbrandt, 'Stateless' [2011] 20 *Cardozo Journal of International and Comparative Law* 75

A. Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers' Rights' [2008] 16 *Feminist Legal Studies* 141

J. Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls?'' [2011] 35(2) *Melbourne University Law Review* 165

A. Mills, 'The Dimensions of Public Policy in Private International Law' [2008] 4 *Journal of Private International Law* 201

A. Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009)

F. Monéger, *Gestation pour autrui: Surrogate motherhood* (Paris, Society of Comparative Legislation 2011)

P. Nayak, 'The Three 'M's of Commercial Surrogacy in India: Mother, Money, and Medical Market' in S. DasGupta and S. Das DasGupta (eds.) *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books 2014), 1-22

P. Nygh, 'Foreign Status, Public Policy and Discretion' [1964] 13 *International and Comparative Law Quarterly* 39

S. O'Brien, 'Commercial Conceptions: A Breeding Ground for Surrogacy' [1986] 65 *North Carolina Law Review* 127

P. Orejudo, 'Recognition in Spain of Parentage Created by Surrogate Motherhood' [2010] 12 *Yearbook of Private International Law* 624

A. Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' [2010] 35(4) *Signs* 969

- M. Paulsen and M. Sovern, 'Public Policy in the Conflict of Laws' [1956] 56 Columbia Law Review 969
- G. Pennings, 'Reproductive Tourism as Moral Pluralism in Motion' [2002] 28 Journal of Medical Ethics 337
- G. Pennings, 'Legal Harmonization and Reproductive Tourism in Europe' [2004] 19(12) Human Reproduction 2689
- M. Radin, 'Market Inalienability' [1987] 100 Harvard Law Review 1928
- R. Rao, 'Surrogacy Law in the United States: The Outcome of Ambivalence' in R. Cook (et al.) (eds.) *Surrogate Motherhood: International Perspectives* (Hart Publishing Oxford 2003)
- J. Reich and D. Swink, 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyber-procreation Era' [2011] 14 Journal of Health Care Law and Policy 241
- I. Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights* (Council of Europe human rights handbooks, Council of Europe Strasbourg 2012)
- G. Ruffieux, 'Retour sur une question controversée: le sort des enfants nés d'une mère porteuse à l'étranger' [2014] *Review des droits et libertés fondamentaux*
- J. Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' [2009] 30 University of Pennsylvania Journal of International Law 1429
- K. Rotabi and N. Bromfield, 'The Decline in Inter-country Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns' [2012] 27(2) Journal of Women and Social Work 129
- K. Rubenstein and D. Adler, 'International Citizenship: the Future of Nationality in a Globalized World' [2000] 7 Indiana Journal of Global Legal Studies 519
- S. Rutten and K. Saarloos (eds.), *Van Afstamming tot Nationaliteit* (Kluwer 2013)
- K. Saarloos, 'European Private International Law on Legal Parenting? Thoughts on a European Instrument Implementing the Principle of Mutual Recognition in Legal Parenting' (Maastricht University 2010)

K. Saarloos and H. van Berkel, 'From Russia with Love: Ouderschap Na Draagmoederschap En De Wet Conflictenrecht Afstamming' [2008] NIPR 117

H. Sants, 'Genealogical Bewilderment in Children with Substitute Parents' [1964] 37 British Journal of Medical Psychology 133

C. Sappideen, 'The Surrogate Mother - A Growing Problem' [1983] 6 University of New South Wales Law Journal 79

F. von Savigny, *System des heutigen römischen Rechts, Band 8* (Berlin, Veit 1849)

R. Schutz, 'Surrogacy in Israel: An Analysis of the Law in Practise' in R. Cook (et al.) (eds.) *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003)

G. van der Schyff, *Limitation of Rights* (Nijmegen Wolf Legal Publishers 2005)

I. Schwenzer, *Model Family Code - from a Global Perspective* (Intersentia 2006)

I. Schwenzer (ed.), *Tensions between Legal, Biological and Social Conceptions of Parentage* (Intersentia 2007)

E. Scott, 'Surrogacy and the Politics of Commodification' [2009] 72 Law and Contemporary Problems 109

J. Shaw, 'The Interpretation of European Union Citizenship' [1998] 61(3) Modern Law Review 293

F. Shenfield (et al.), 'Cross Border Reproductive Care in Six European Countries' [2010] ESHRE

K. Simmonds, 'Reforming the Surrogacy Laws of Australia; Some Thoughts, Considerations and Alternatives' [2009] 11 Flinders Journal of Law Reform 97

A. Singer, 'The Right of a Child to Parents' in K. Boele-Woelki, N. Dethloff, and W. Gephart (eds.) *Family Law and Culture in Europe - Developments, Challenges and Opportunities* (Intersentia 2014), 137

P. Singer and D. Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford Paperbacks 1984)

- U. Smerdon, 'Birth Registration and Citizenship Rights of Surrogate Babies Born in India' [2012] 20(3) *Contemporary South Asia* 341
- U. Smerdon, 'Crossing Bodies, crossing Borders: International Surrogacy between the United States and India' [2008] 39(1) *Cumberland Law Review* 15
- D. Smolin, 'Intercountry Adoption as Child Trafficking' [2004] 39(2) *Valparaiso University Law Review* 281
- D. Smolin, 'The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals' [2005] *Seton Hall Law Review* 403
- J. Sosson, 'La filiation d'enfants nés d'une gestation pour autrui à l'étranger' [2010] 4 *Revue trimestrielle de droit familial* 1153.
- D. Spielmann, 'Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (CELS Working Paper Series, 2012)
- C. Spivack, 'The Law of Surrogate Motherhood in the United States' [2010] 58 *American Journal of Comparative Law* 97
- C. Spivack, 'USA' in F. Moneger (ed.) *Gestation pour autrui: Surrogate Motherhood* (International Academy of Comparative Law 2010)
- B. Stark, 'The Women's Convention, Reproductive Rights, and the Reproduction of Gender' [2011] 18 *Duke Journal of Gender Law and Policy* 261
- B. Stark, 'Transnational Surrogacy and International Human Rights Law' 18(2) *ILSA Journal of International and Comparative Law* 2012
- E. Stehr, 'International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation' [2012] *Hastings International and Comparative Law Review* 253
- E. Steiner, 'The Tensions between Legal, Biological and Social Conceptions of Parenthood in English Law' [2006] 10(3) *Electronic Journal of Comparative Law*

I. Stuyver and I. De Sutter, 'A Five-Year Experience with Gestational Surrogacy and the Impact of Legal Changes' [2010] *Human Reproduction* 12

J. Stoll, 'Surrogacy Arrangements and Legal Parenthood. Swedish Law in a Comparative Context' (Dissertation, Uppsala University 2013)

R. Storrow, 'Travel into the Future of Reproductive Technology' [2012] 79(2) *University of Missouri-Kansas City Law Review* 296

R. Storrow 'The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy' [2012] 20(3) *Journal of Gender, Social Policy and the Law* 561

R. Storrow, 'The Pluralism Problem in Cross-Border Reproductive Care' [2010] 25(12) *Human Reproduction* 2939

R. Storrow, 'Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-border Reproductive Travel' [2011] 23(5) *Reprod Biomed Online* 538-545

R. Storrow, 'The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception' [2005] 12 *Texas. Wesleyan Law Review* 189

R. Storrow, 'Quests for Conception: Fertility Tourists, Globalisation, and Feminist Legal Theory' [2005] 57 *Human Reproduction* 295

E. Strautins, *Limping Legal Relationships within the Legal Order of European Union: Concept, Reasons for Emersion, Consequences, Current Situation at the EU - Treatment, Settlement and Means of Prevention* (Lambert Academic Publishing 2010)

N. Subramanian, 'Making Family and Nation: Hindu Marriage Law in Early Postcolonial India' [2010] *Journal of Asian Studies* 771

A. Struycken, 'Surrogacy, a New Way to Become a Mother? A New PIL Issue' in K. Boele-Woelki (et al.) (eds.) *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr*, (Schulthess Juristische 2010), 367

E. Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' [2008] 67 *Social Science and Medicine* 1104

- W. Tetley, 'Evasion, Fraude à la Loi and Avoidance of the Law' [1994] 39(2) McGill Law Journal 303
- L. Theis, N. Gamble, and L. Ghevaert, 'Re X and Y (Foreign Surrogacy): A Trek through a Thorn Forest' [2009] 39 Family Law Journal 239
- J. Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' [2014] 63(2) International and Comparative Law Quarterly 317
- V. Todorova, 'Recognition of Parental Responsibility: *Biological Parenthood v. Legal Parenthood*, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU action?' [October 2010] European Parliament
- K. Tuininga, 'The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law' [2008] 41 Creighton Law Review 185
- J. Verhellen, 'Inter-Country Surrogacy: A Comment on Recent Belgian Cases' [2011] Nederlands International Privaatrecht 657
- J. Verhellen and J. Verschelden, 'National Report on Belgium' in P. Beaumont and K. Trimmings (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013)
- P. Vink and G. de Groot, 'Birth Right Citizenship: Trends and Regulations in Europe', November 2010 EUDO Citizenship Observatory
- M. Vonk, 'Maternity for Another: A Double Dutch Approach' [2010] 14(3) Electronic Journal of Comparative Law
- M. Vonk and K. Boele-Woeki, 'Surrogacy and Same-Sex Couples in the Netherlands' in K. Boele-Woelki and A. Fuchs, *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (Cambridge, Antwerp: Intersentia 2012)
- M. Vonk, 'The Role of Formalized and Non-Formalised Intentions in Legal Parent-Child Relationship in Dutch Law' [2008] 4(2) Utrecht Law Review 117
- M. Vonk, 'One, Two or Three Parents?' [2004] 18 International Journal for Law, Policy and the Family 114

M. Vonk, *Children and Their Parents: A Comparative Study of the Legal Position of Children with Regard to Their Intentional and Genetic Parents in English and Dutch law* (Antwerp/Oxford: Intersentia 2007)

M. Vonk, 'Netherlands: Maternity for Another - A Double Dutch Approach', in F. Monéger, *Gestation pour autrui : Surrogate Motherhood* (Paris, Society of Comparative Legislation 2011)

K. Vora, 'Medicine, Markets and the Pregnant Body: Indian Commercial Surrogacy and Reproductive Labor in a Transnational Frame' [2010] Scholar & Feminist Online

J. Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' [2002] 10 Medical Law Review

L. van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp: Intersentia 2008)

H. Muir Watt, 'Concurrence d'ordres juridiques et conflits de lois de droit privé' in *Le droit international privé : esprit et méthodes. Mélanges en l'honneur de Paul Lagarde* (Paris Dalloz 2005) 615

H. Muir Watt, 'Concurrence d'ordres juridiques et conflits de lois de droit privé' in M. Lagarde, *Vers de nouveaux équilibres entre ordres juridiques: Mélanges en l'honneur d'Hélène Gaudemet-Tallon* (Paris, Dalloz 2008) 617

D. Wald, 'The Parentage Puzzle: The Interplay between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage' [2006-2007] 15 Journal of Gender, Social Policy and the Law 379

P. Wautelet, 'Un nouvel épisode dans la saga de la surrogacy transfrontière' note on Liège (1st ch.), 6 September 2010

P. Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws' in A. Aleinikoff and D. Klusmeyer (eds.) *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press 2001)

J. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration* (Cambridge University Press 1999)

M. Wells-Greco, 'Same-Sex Second Parent Adoption – A Missed Opportunity' [2012] *International Family Law Journal*

M. Wells-Greco, 'Surrogacy, Parenthood and Nationality: Much Ado about Everything' in S. Rutten and K. Saarloos (eds.), *Van Afstamming tot Nationaliteit* (Kluwer 2013)

M. Wells-Greco, 'Second-Parent Adoption in a Same-Sex Relationship: Gentle Strides in the Recognition of Family Forms and Human Relations' [2013] *International Family Law Journal*

M. Wells-Greco, 'Maternité de substitution : A quels parents et à quelle(s) nationalité(s) les enfants ont-ils le droit?' (pending) to be published by the Institut Universitaire Kurt Bösch (IUKB) 2014 Congress report

M. Wells-Greco, 'Citizenship and Free Movement Rights: Beyond Economic Links' in M. Horspool and M. Humphrey (eds.) *EU Law* (8th ed. OUP 2014)

M. Welstead, 'Addicted to Motherhood – A Cautionary Tale' [2010] 22 *Denning Law Journal* 209

B. Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' [2013] 14 *Cardozo Law Review*

L. Van Zyl, 'Intentional Parenthood: Responsibilities in Surrogate Motherhood' [2002] 10 *Health Care Analysis* 165

INTERNATIONAL INSTRUMENTS

The Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as amended by Protocols Nos. 11 and 14 Council of Europe Treaty Series, No. 5 (European Convention of Human Rights)

Brighton Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 18-20 April 1012, CDDH(2012)007

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

European Union

Charter of Fundamental Rights of the European Union (the European Charter),
7 December 2000

Hague Conference on Private International Law

Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect
of Inter-country Adoption

G. Parra-Aranguren, 'Explanatory Report on the Convention on Protection of Children
and Co-operation in Respect of Inter-country Adoption' (Hague Conference on Private
International Law 1993)

Conclusions and Recommendations Adopted by the Special Commission on the practical
operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-
operation in Respect of Inter-country Adoption (17–25 June 2010)

Hague Conference Permanent Bureau, 'Private International Law Issues Surrounding the
Status of Children, including Issues Arising from International Surrogacy Arrangements'
(General Affairs and Policy: Doc. Prel. No 11) (March 2011)

Hague Conference Permanent Bureau, 'Preliminary Report on the Issues Arising from
International Surrogacy Arrangements' (General Affairs and Policy: Doc. Prel. No 10)
(March 2012)

Hague Conference Permanent Bureau, 'Conclusions and Recommendations Adopted by
the Council, Council on General Affairs and Policy of the Conference' (17-20 April 2012)

Hague Conference Permanent Bureau, 'Report of the Council on General Affairs and
Policy of the Conference of 17-20 April 2012', Doc. Prel. No 1 (July 2012)

Hague Conference Permanent Bureau, 'A Study of Legal Parentage and the Issues Arising
from International Surrogacy Arrangements', Prel. Doc. No 3 C for the attention of the
Council of April 2014 on General Affairs and Policy of the Conference (March 2014)
(‘HCCH 2014 Study’)

Hague Conference Permanent Bureau, 'The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project', Prel. Doc. No 3 B (April 2014) ('HCCH 2014b Report')

The United Nations

Universal Declaration of Human Rights (1948) 217 A (III)

International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195

International Covenant on Civil and Political Rights (1966) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3

Vienna Convention on the Law of the Treaties (1969) 1155 331

Convention on the Elimination of All Forms of Discrimination against Women (1979) A/RES/34/180

Convention on the Rights of the Child (1989) UNTS 1577 3

Convention on the Rights of Persons with Disabilities (2006) A/RES/61/106, Annex I

UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014

UNHCR Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons HCR/GS/2/01

UNHCR Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person HCR/GS/12/02

UNHCR Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level HCR/GS/12/03

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

UNHCR Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04

Summary Conclusions of the UNHCR Expert Meeting 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality', Tunis, Tunisia, 31 October-1 November 2013

Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, in accordance with Human Rights Council resolution 17/1. 'Report of the Special Rapporteur on trafficking in persons, especially women and children' A/68/256 (2 August 2013) International Covenant on Civil and Political Rights 1966

INTERNATIONAL AND REGIONAL INSTRUMENTS

European Convention on Human Rights (1950) ETS 5

American Convention on Human Rights (1969)

African Charter on the Rights and Welfare of the Child (1990) CAB/LEG/24.9/49

The Cairo Declaration on Human Rights in Islam (1990)

Arab Charter on Human Rights (1994)

CIS Convention on Human Rights and Fundamental Freedoms (1995)

European Convention on Nationality (1997) ETS 166

Covenant on the Rights of the Child in Islam (2005) OIC/9-IGGE/HRI/2004/Rep.Final

Council of Europe Convention on the Avoidance of Statelessness in relation to State succession 2006 CETS 200

CASE LAW (SURROGACY)

European Court of Human Rights

Lavissee v. France (Application No. 14223/88)

Sylvie Mennesson v. France (Application No. 65192/11)

Francis Labassee and others v. France (Application No. 65941/11)

Paradiso and Campanelli v. Italy (Application No. 25358/12)

D and Others v. Belgium (Application No. 29176/13)

Laborie v. France (Application No. 44024/13)

Foulon v. France (Application No 9063/14)

Bouvet v. France (Application No. 10410/14)

European Union

CD v. ST [2013] No C-157/12

Z v. A Government Department and the Board of Management of a Community School
[2013] No C-363/12

France

CA Rennes, 4 July 2002, n°01/02 471 D 2002

CA Rennes, 29 March 2011, n°10/02646

C. Cass, 1st Civ., 6 April 2011

CA Rennes, 10 January 2012, n° 11/02758

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

CA Paris, 10 January 2012, n° 11/01846

CA Rennes, 21 February 2012, n° 11/02758

C. Cass, 22 September 2014, Avis n°15010 and 15011

Switzerland

Urteil Verwaltungsgericht, B 2013/158, 19 August 2014 and SA_748/2014

Austria

Verfassungsgerichtshof, 14.12.2011 - B13/11-10

Verfassungsgerichtshof, 11.10.2012 - B 99/12

Belgium

Civ. Ghent (15th ch.), 16 January 1989 T.G.R., 1989

Civ. Brussels (13th ch.), 1 March 2007 Rev. trim. dr. fam., 2007, 754

Civ. Antwerp (16th ch. bis), 14 January 2008 R.W. 2007-2008, no. 42

Civ. Antwerp, 19 December 2008 Revue@dipr.be, 2010, liv. 4, 140

Civ. Youth Court Brussels, 6 May 2009 J.L.M.B., 2009/23

Civ. Brussels (interim), 6 April 2010 Rev. trim. dr. fam., 2010, 1164

Civ. Brussels, 15 February 2011 Revue@dipr.be, 2011, 125

Civ. Nivelles, 6 April 2011 Rev. trim. dr. fam., 2011, 695

Civ. Ghent (15th ch.), 30 April 2012 RGDC 2012/8

Civ. Brussels (7th ch.), 13 May 2014 2012/5418/B

Civ. Brussels, 31 July 2013 Rev. trim. dr. fam., 2014/3, 541

The Netherlands

Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844

Rechtbank Utrecht, 7 May 2008, LJN: BD1068

Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197

Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317)

Rechtbank Haarlem, 10 January 2011, LJN: BP0426

Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU3627

Rechtbank Haarlem, 28 November 2012, LJN: BY4231

United Kingdom

C (A Minor) (Ward: Surrogacy), Re Family Division, 14 January 1985 [1985] Fam. Law 191; (1985) 135 N.L.J. 106

P (Minors) (Wardship: Surrogacy), Re Family Division, 1 January 1987 [1987] 2 F.L.R. 421; [1988] F.C.R. 140; [1987] Fam. Law 414; (1987) 151 J.P.N. 334

MW (Adoption: Surrogacy), Re Family Division, 12 July 1994 [1996] 1 F.L.R. 369; [1996] 2 F.C.R. 345; [1996] Fam. Law 206

Q (A Minor) (Parental Order), Re Family Division, 23 November 1995 [1996] 1 F.L.R. 369; [1996] 2 F.C.R. 345; [1996] Fam. Law 206

W v. H (Child Abduction: Surrogacy) (No.1) Family Division, 18 February 2002 [2002] 1 F.L.R. 1008; [2002] Fam. Law 345

C (Surrogacy: Payments), Re Family Division, 22 February 2002 [2002] EWHC 157 (Fam); [2002] 1 F.L.R. 909

W v. H (Child Abduction: Surrogacy) (No.2) Family Division, 10 April 2002 [2002] 2 F.L.R. 252; [2002] Fam. Law 501

N (A Child), Re Family Division, 10 July 2007 [2008] 1 F.L.R. 177; [2008] Fam. Law 18

N (A Child), Re Court of Appeal (Civil Division), 25 July 2007 [2007] EWCA Civ 1053; [2008] 1 F.L.R. 198; [2008] Fam. Law 21

G (Surrogacy: Foreign Domicile), Re Family Division, 28 November 2007 [2007] EWHC 2814 (Fam); [2008] 1 F.L.R. 1047

X (Children) (Parental Order: Foreign Surrogacy), Re Family Division, 9 December 2008 [2008] EWHC 3030 (Fam); [2009] Fam. 71

S (Parental Order), Re Family Division, 9 November 2009 [2009] EWHC 2977 (Fam); [2010] 1 F.L.R. 1156

K (Minors: Foreign Surrogacy), Re Family Division, 28 May 2010 [2010] EWHC 1180 (Fam); [2011] 1 F.L.R. 533 (Mixed or Mildly Negative Judicial Treatment)

L (A Child) (Parental Order: Foreign Surrogacy), Re Family Division, 8 December 2010 [2010] EWHC 3146 (Fam); [2011] Fam. 106

TT (Surrogacy), 21 January 2011 [2011] EWHC 33 (Fam); [2011] 2 F.L.R. 392

IJ (A Child) (Foreign Surrogacy Agreement: Parental Order), Re Family Division, 19 April 2011 [2011] EWHC 921 (Fam); [2011] 2 F.L.R. 646

Z v. C (Parental Order: Domicile) Family Division, 2 December 2011 [2011] EWHC 3181 (Fam); [2012] 2 F.L.R. 797 (Positive or Neutral Judicial Treatment)

X (Children) (Parental Order: Retrospective Authorisation of Payments), Re Family Division, 6 December 2011 [2011] EWHC 3147 (Fam); [2012] 1 F.L.R. 1347 (Positive or Neutral Judicial Treatment)

D (Children) (Surrogacy: Parental Order), Re Family Division, 28 September 2012 [2012] EWHC 2631 (Fam); [2013] 1 W.L.R. 3135; [2013] 1 All E.R. 962 (Positive or Neutral Judicial Treatment)

A (Parental Order: Domicile), Re Family Division, 14 February 2013 [2013] EWHC 426 (Fam); [2014] 1 F.L.R. 169

J v. G (Parental Orders) Family Division, 26 March 2013 [2013] EWHC 1432 (Fam); [2014] 1 F.L.R. 297

C (A Child) (Parental Order), Re Family Division, 15 May 2013 [2013] EWHC 2413 (Fam); [2014] 1 F.L.R. 654

P-M (Parental Order: Payments to Surrogacy Agency), Re Family Division, 6 June 2013 [2013] EWHC 2328 (Fam); [2014] 1 F.L.R. 725

C (A Child) (Parental Order), Re Family Division, 19 July 2013 [2013] EWHC 2408 (Fam); [2014] 1 F.L.R. 757 (Positive or Neutral Judicial Treatment)

W, Re Family Division, 9 October 2013 [2013] EWHC 3570 (Fam)

Q (A Child) (Parental Order: Domicile), Re Family Division, 14 February 2014 [2014] EWHC 1307 (Fam); [2014] Fam. Law 1256

WT (Foreign Surrogacy), Re Family Division, 4 March 2014 [2014] EWHC 1303 (Fam); [2014] Fam. Law 1117

JP v. LP (Surrogacy Arrangement: Wardship) Family Division, 5 March 2014 [2014] EWHC 595 (Fam); [2014] Fam. Law 813

D (A Child) (Surrogacy), Re Family Division District Registry (Leeds), 19 March 2014 [2014] EWHC 2121 (Fam); [2014] Fam. Law 1402

G (Parental Orders), Re Family Division, 1 April 2014 [2014] EWHC 1561 (Fam); [2014] Fam. Law 1114

X (A Child) (Surrogacy: Time Limit), Re Family Division District Registry (Birmingham), 3 October 2014 [2014] EWHC 3135 (Fam)

India

Soos v. Superior Court, 897 P.2d 1356 1361 (Ariz. Ct. App. 1994)

THE STATUS OF CHILDREN ARISING FROM INTER-COUNTRY SURROGACY ARRANGEMENTS

Jan Balaz v. Anand Municipality, 11 November 2009 Letters Patent Appeal No. 2151 of 2009 in Special Civil Application No. 3020 Of 2008

Baby Manji Yamada v. Union of India, A.I.R. 2009 S.C. 84

USA

re *Baby M*, 537 A.2d 1227, 1237 (N.J. 1988)

Johnson v. Calvert, 851 P.2d 776 (Cal. 1993)

re *Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994)

re *Marriage of Buzzanca* (1998), 61 Cal. App. 4th 1410 [72 Cal. Rptr. 2d 280]

Elisa B. v. Superior Court, 37 Cal. 4th 108 (2005)

Kristine H. v. Lisa R., 37 Cal. 4th 156 (2005)

K.M. v. E.G., 37 Cal. 4th 130 (2005)

NATIONAL REPORTS

UK

M. Warnock, *A question of life: The Warnock Report on Human Fertilisation and Embryology* (HMSO: Oxford 1985, Warnock Report)

M. Brazier, A. Campbell and S. Golombok, 'Surrogacy Review for Health Ministers of Current Arrangements for Payments and Regulation' (HMSO: London 1998, Brazier Report)

Switzerland

Swiss Federal Council, 'Rapport sur la maternité de substitution', Rapport du Conseil fédéral du 29 novembre 2013 en exécution du postulat 12.3917 du 28 septembre 2012

France

Sénat 2007-2008, 'Rapport d'information sur la maternité pour autrui' (28 June 2008), N° 421 Sénat Session Ordinaire De 2007-2008

Netherlands

K. Boele-Woelki (et al.), 'Commercial Surrogacy and the Unlawful Placement of Children in the Netherlands', University Utrecht's Centre for European Research into Family Law, 2012 (Draagmoederschap en illegale opnemng van kinderen' [2012] serie Familie & Recht no. 4, Boom Juridische Uitgevers)

RELEVANT CONFERENCES/SPEAKING ENGAGEMENTS

Speaker at the Conference convened by the Journal of Private International Law on the topic of 'Cross-border surrogacy and nationality: achieving full parent status' (Milan, May 2013)

IUKB 'Enfants, familles, Etat: Les droits de l'enfant en péril?' convened by Prof. Philip D. Jaffé Institut universitaire Kurt Bösch (IUKB, Sion, May 2014)

UK reporter at an International Workshop on National Approaches to Surrogacy, held at the University of Aberdeen, between 30 August and 1 September 2011

APPENDIX 8

ACKNOWLEDGMENTS

Numerous friends and colleagues at Maastricht University have provided a sounding board, and sound advice, for this thesis. Special thanks are due to my promoters Prof. Dr. G-R. de Groot and Dr. S. Rutten, whose constructive comments, enthusiasm, and interest in this topic require a particular note of gratitude. Thanks are also due to participants in the seminars and workshops at which I have discussed parts of this thesis (including at P. Beaumont's and K. Trimming's Aberdeen Workshop and the IUKB (Sion) Colloque in May 2014), and, more broadly, to colleagues in the field that have provided inspiration along this research journey: William Bull, the team at the Permanent Bureau of the Hague Conference on Private International Law, Cees Flinterman, Pauline Kruiniger, Iverna McGowan-Smyth, and Kees Saarloos. Finally, this thesis could not have been written without the unwavering support and patience of David; niringrazzjak hafna għall-familja kollha.

APPENDIX 9

CURRICULUM VITAE

Michael Wells-Greco (London, 9 August 1982)

Michael has a Bachelor of Laws in English law with Italian law (University College London and the University of Genova) and a Master of Laws (cum laude) from Maastricht University (graduating in the top 3%). Michael is admitted to practice as a solicitor before the Senior Courts of England and Wales and as a solicitor advocate in the Territory of the British Virgin Islands.

Michael is a partner of an international law firm specialising in cross-border family law and private client matters. Michael has advised families, government authorities, and other lawyers on the application of private international law and European and international human rights in matters concerning parentage, child protection, and nationality law.

In addition to his academic research, Michael has taught undergraduate and graduate courses in the fields of international family law and private and public international law. He publishes and lectures regularly in the fields of his research interests.

APPENDIX 10

SUMMARY IN ENGLISH

CHAPTER ONE – INTRODUCTION TO THIS THESIS

This thesis is about the status of the child and the determination of legal parentage and nationality of a child born in a case of inter-country surrogacy. The overarching purpose of this thesis is to examine the legal aspects of parenthood and birth-right nationality following surrogacy arrangements, the influence of European and international human rights law on the determination of parentage, the establishment of nationality, the prevention of statelessness, and to explore options for regulation. The aims of this research are to establish whether national laws on parenthood and the establishment of nationality sufficiently protect the interests of the surrogate-born child and the parties to a surrogacy arrangement. Important questions explored include whether existing national rules need to be amended or clarified or whether new rules at a domestic, regional, and/or international level are needed.

This thesis starts from the premise that it cannot be in the best interests of children born by way of surrogacy to leave their important relationships of care outside of a legal framework of rights and responsibilities. A balance is needed, placing the best interests of the child as a primary consideration but also respecting the balance that must be achieved between children, intending parents, the surrogate, and the state. The challenge is to ensure that all children enjoy human rights equally (rights to a nationality, an identity, and to establish family relationships) irrespective of a child's method of conception and birth while, at the same time, realising these rights within a child protection framework.

While the fundamental rights and interests of children and various international human rights instruments have been identified, no research project to date has examined substantively what European and international human rights law would actually require in the fields of parentage and nationality context of inter-country surrogacy. To build upon the existing research in this fast-evolving subject-matter, a multi-disciplinary legal approach is needed.

This thesis contains six chapters. Chapter One comprises the introduction. The structure of the remaining chapters is the following.

CHAPTER TWO – MAPPING THE POLICY ISSUES

This chapter is interested in what is surrogacy, the reasons why people turn to surrogacy, the arguments for and against surrogacy, and the business and practice of surrogacy. These matters are explored in order to identify the key public policy issues and to gain some insight into why surrogacy can be difficult to regulate. This approach is taken on the basis that the ‘problems’ that surrogacy seems to pose for many cannot be understood without an account of the policy and social issues surrounding surrogacy.

This chapter considers that surrogacy has gone from being regarded principally as a vehicle for heterosexual married to being a potential means for expanding all forms of families. Given this development, it is not surprising that the place of surrogacy in family formation is by no means uncontested. Indeed, it needs to be acknowledged that many communities are observing the naissance of whole new sets of relationships following surrogacy arrangements that are just beginning to be understood: relationships between surrogates and intending parents; between the surrogate and the foetus; between the gamete donors and the future child; and between the surrogate’s family, the intending parents, and the surrogate-born child.

The diversity of perspectives and responses suggests that any proposed solution to the legal problems created by surrogacy is bound to be ideologically embedded. This is evident in the divergence between what is defined as acceptable practice within different national contexts. The attitudes which support the views expressed in relation to surrogacy, perhaps most notably the assumptions regarding its necessary evils in all cases, may be a product of the lack of empirical research and study and might, upon assessment by states in specific cases, be out of step with popular opinion. Recognising this, it is suggested that a more nuanced understanding is required. An important question which emerges is whether arguments against surrogacy, and against any regulation thereof, are equally persuasive. None of the discussion is to deny that surrogacy raises significant policy (and ethical) questions, which merit close scrutiny or to deny, in the context of inter-country surrogacy, the concerns regarding commodification and exploitation. It is, however, to suggest that common ground can be found and a framework for regulation possible. Studies in the area of adoption and the more specific areas of children born by MAR technologies have shown that certainly common elements and shared thought patterns can be found.

CHAPTER THREE – A COMPARATIVE PERSPECTIVE

The main purpose of this chapter is to explore the national legal rules for establishing legal parenthood and nationality at the time of the child’s birth in each of the research jurisdictions, with a view to seeing how the rules apply to inter-country surrogacy arrangements.

In the first part, an analysis of the national rules (if any) and approaches to surrogacy in each of the research jurisdictions are examined. There is an examination of domestic laws on surrogacy and nationality in each of the research jurisdictions in the following order: (i) jurisdictions which are considered to be anti-surrogacy – France, Switzerland, Austria; (ii) jurisdictions where surrogacy is unregulated – Belgium and the Netherlands; (iii) a jurisdiction with a permissive approach to surrogacy – the United Kingdom; and (iv) jurisdictions which have a permissive approach to commercial surrogacy – India and California. In addition to the research interviews conducted, explanatory reports, case law, and commentaries in each of the legal systems involved have been consulted.

In the second part of this chapter, attention shifts to consider what conclusions can be drawn from the comparative review. An insight into the differences and similarities of the national rules and approaches with respect to the establishment of legal parentage and the nationality of the surrogate-born child is therefore presented. A key aim is to find any common ground. The second part critically analyses the findings from the national reviews in order to identify the emerging legal problems and protection gaps as well any clear trends and common responses to inter-country surrogacy among the research jurisdictions. What is clear is that the phenomenon of inter-country surrogacy has given rise to a thriving international market.

CHAPTER FOUR – CHILDREN’S RIGHTS IN INTER-COUNTRY SURROGACY

Having looked at how the research jurisdictions respond to inter-country surrogacy, the existing international framework in which the national systems have to function is examined. The treatment of surrogate-born children, the surrogate, the intending parents, and gamete providers raises clear human rights issues. The findings in Chapter Three illustrate that the practice of surrogacy implicates a number of rights issues, principally: the best interests of the child; a child’s right to information about his or her origins; the need for continuity in a personal status to avoid limping family relations; and the informed and free consent of the surrogate. There is another reason why a consideration of the role of international human rights is examined. Since surrogacy, and inter-country surrogacy in particular, usually has the irreversible effect of severing often legal bonds with the surrogate and establishing family relationships between the child and the intending parents and involves the transfer of children across borders, surrogacy should not be considered lightly.

This chapter seeks to determine how best to understand and to protect the rights of children and the adult parties in inter-country surrogacy by providing content to the relevant principles set out in European and international human rights law; this is because any national approach to inter-country surrogacy must be coherent with and informed by these principles. The objective is to engage in an analysis of the most relevant interna-

tional instruments in order to provide a comprehensive overview of the current standards and to identify whether there is a normative gap in the protection of surrogate-born children.

Relevant international instruments are considered in the order of their regional application, starting with the instruments of the United Nations, then those of the Hague Conference on Private International Law, the Council of Europe, and, finally, the instruments of the European Union. Non-binding instruments such as the work of the Commission on European Family Law are also discussed.

In the European context, this chapter examines whether the right to private and family life and the principle of the best interests of the child and doctrine of proportionality (forming part of the assessment of necessity) found in the jurisprudence of the European Court of Human Rights might play a role in dismantling surrogacy prohibitionist laws. The implications of EU law and free movement provisions in the context of surrogacy are also considered.

The chapter concludes that none of the regional or international instruments discussed forbid surrogacy outright, nor can any of the discussed instruments be interpreted as forming an obstacle to national legislation that allows surrogacy. At the same time it is accepted that the inevitability of inter-country commercial surrogacy does not of itself justify a permissive regulatory regime if the practice is deemed to be contrary to international law; one of the most important guiding principles is of informed and continuing consent of the surrogate. It is suggested that there is a children's right imperative to work concerning the transfer of children across borders, legal parentage, and a child's identity.

CHAPTER FIVE – THE RIGHT TO A NATIONALITY AND THE PREVENTION OF STATELESSNESS

Non-recognition of the parent-child relationship may have a number of serious consequences for the rights and welfare of the child, in particular regarding the child's right to acquire a nationality, and states' obligations to ensure that children do not end up stateless. The topic of surrogacy in the context of citizenship is therefore considered in this chapter. The key questions are: Should the child acquire the citizenship of his/her intending parent(s)? Should the child acquire the citizenship of the state in which he/she was born? How, if at all, is the child's statelessness prevented and what obligations or international standards are states subject to when considering registration as well as the citizenship and status of a child born by means of a surrogacy arrangement? In the context of the child's right to a nationality and obligations placed on states to prevent statelessness, further questions are answered: What of a surrogate-born child's loss of nationality on the basis of a change in the child's personal status (e.g. a subsequent determination of parentage in

favour of the intending parents)? If a child has been rendered stateless then domestic law is arguably indirectly discriminatory; for example, it discriminates against children born by surrogacy by omission of the existence of any law protecting them from statelessness in that circumstance.

For a surrogate-born child, then, it follows that if the legal parental status of the surrogate and the intending parents is unclear, or not possible to determine at the time of the child's birth, the child's right to having a nationality cannot usually be satisfied. The objective is to determine whether under international law there is an arguable violation of a right to a nationality in citizenship cases of stateless surrogate-born children.

This chapter examines the efforts which have been undertaken at a bilateral, regional, or international level either towards cross-border co-operation in this area or towards a universal right to a nationality and the prevention of statelessness and frames these efforts in order to set out the responsibility of states towards surrogate-born children. Again, recommendations are provided.

CHAPTER SIX – WHERE TO FROM HERE?

A source of worry is the completely unregulated character of global surrogacy and the perceived policy vacuum within which surrogacy has developed (and is developing) in a haphazard fashion. Addressing this issue, possible types of legal regulation of surrogacy arrangements at both the domestic and international level are explored.

In addition to summarising the findings in Chapters Three, Four, and Five, several conclusions and recommendations are made about connected issues that should be considered when a state is considering the regulation of inter-country surrogacy.

At the international level, the advantages and disadvantages of a formal, binding instrument, such as a convention, or an informal non-binding recommendation or guidelines on minimum standards and/or common principles is discussed. Given the multitude of issues and a need for a global response, a comprehensive international instrument specifically aimed to resolve the challenges of cross-border surrogacy is considered necessary. Yet, given the differing approaches to the legal issues concerning surrogacy, this thesis explores whether and to what extent, coordinated soft law approaches – guidelines with common principles and minimum standards – are more likely to be found feasible as a first step for a number of reasons. First, the experience with recommendations and guidelines in other areas of law tends to demonstrate that they are generally followed by states and acknowledged by international courts and human rights treaty bodies. Secondly, while it is submitted that there is a case for an international approach, that approach will be best formulated, however, when individual countries have formed their own views. Indeed, the understanding of the needs of surrogate-born children and each of the parties

to a surrogacy continues to evolve and deepen, it may be necessary to revise the conclusions of any recommendation in a few years, but that would be very difficult if the binding form of a convention were already chosen. Thirdly, the form of the recommendation being non-binding, leaves the states some flexibility in applying them, which the special circumstances of surrogate-born children and their families may require. Fourthly, a recommendation offers the advantage of public and political awareness and being available to be applied immediately, even pending the entry into force of a convention. Lastly, some more general reflections are offered on how to tackle the challenges that remain relevant in the context of inter-country surrogacy.

APPENDIX 11

SUMMARY IN DUTCH

HOOFDSTUK 1 – ACHTERGROND

Dit proefschrift behandelt de juridische positie en de vaststelling van het juridisch ouderschap en de nationaliteit van een kind dat geboren is via interlandelijk draagmoederschap. De redenen voor dit proefschrift zijn om de juridische aspecten van ouderschap en nationaliteit als geboorterecht na een draagmoederschapsconstructie, en de invloed van Europese en internationale mensenrechten op de vaststelling van ouderschap, de vaststelling van de nationaliteit en het voorkomen van staatloosheid te onderzoeken, en de mogelijkheden voor regulering te verkennen. De doelstelling van dit onderzoek is om vast te stellen of nationale rechtsregels met betrekking tot ouderschap en nationaliteit de belangen van het kind dat geboren is via draagmoederschap en de partijen die betrokken zijn bij een draagmoederschap constructie, voldoende beschermen. Belangrijke vragen, onder andere of bestaande, nationale regels al dan niet moeten worden gewijzigd of verduidelijkt en of nieuwe regels nationaal, regionaal en/of internationaal geïntroduceerd moeten worden, zijn in dit verband onderzocht.

Het uitgangspunt van dit proefschrift is dat het niet in het belang kan zijn van kinderen die geboren zijn door middel van draagmoederschap dat de voor hen belangrijke relaties met hun verzorgers buiten een juridisch kader van rechten en plichten blijven. Hier is een evenwicht nodig waarbij het belang van het kind vooropgesteld wordt, maar waarbij ook de balans gerespecteerd wordt die tussen kinderen, wensouders, draagmoeder en de staat bereikt moet worden. De uitdaging ligt in het waarborgen van gelijke fundamentele rechten voor alle kinderen (recht op nationaliteit, recht op een identiteit en het recht op familiebanden), ongeacht de wijze van conceptie en geboorte, terwijl deze rechten tegelijkertijd gerealiseerd worden binnen het kader van kindbescherming.

Ondanks het feit dat de fundamentele rechten en belangen van kinderen en verschillende internationale mensenrechteninstrumenten zijn geïdentificeerd, heeft vooralsnog geen onderzoeksproject inhoudelijk onderzocht welke eisen het Europees en Internationaal recht stelt op het gebied van ouderschap en nationaliteit in de context van interlandelijk draagmoederschap. Om voort te bouwen op bestaand onderzoek in dit zich snel ontwikkelende rechtsgebied is een multidisciplinaire juridische aanpak nodig.

Dit proefschrift bestaat uit zes hoofdstukken. Hoofdstuk 1 omvat de introductie. De opbouw van de overige hoofdstukken is als volgt:

HOOFDSTUK 2 – HET IN KAART BRENGEN VAN DE BELEIDSKWESTIES

Dit hoofdstuk heeft betrekking op wat draagmoederschap precies is, de redenen waarom personen kiezen voor draagmoederschap, de argumenten voor en tegen draagmoederschap en de handel en praktijk rond draagmoederschap. Dit alles wordt onderzocht, zodat de belangrijkste openbareordekwesties geïdentificeerd kunnen worden en zodat inzicht verkregen kan worden in de problemen waar tegenaan gelopen wordt wanneer draagmoederschap gereguleerd wordt. Voor deze aanpak is gekozen omdat de ‘problemen’ die volgens velen samengaan met draagmoederschap, niet begrepen kunnen worden zonder rekening te houden met de openbare orde- en sociale kwesties die met draagmoederschap samenhangen.

Dit hoofdstuk beschouwt draagmoederschap als zijnde geëvolueerd van hoofdzakelijk een middel voor getrouwde heteroseksuele koppels tot een potentieel middel waarmee elke gezinsvorm kan worden uitgebreid. Gezien deze ontwikkeling is het geen verrassing dat de rol die draagmoederschap speelt in gezinsvorming geenszins onomstreden is.

De verscheidenheid aan perspectieven en reacties suggereert dat elke voorgestelde oplossing voor de juridische problemen die veroorzaakt worden door draagmoederschap, zeker ideologisch ingegeven is. Dit blijkt duidelijk uit de uiteenlopende definities van ‘acceptable practice’ die binnen de verschillende nationale contexten gehanteerd worden. Opvattingen die de standpunten met betrekking tot draagmoederschap ondersteunen – misschien wel met name de aanname dat het in alle gevallen een noodzakelijk kwaad is – kunnen een gevolg zijn van het gebrek aan studies en empirisch onderzoek en zouden – bij onderzoek door staten in specifieke gevallen – wel eens niet gedeeld kunnen worden door de publieke opinie. Hiervan uitgaande wordt een meer genuanceerd begrip voorgesteld. Een belangrijke vraag die zich vervolgens voordoet, is of de argumenten tegen draagmoederschap – en tegen iedere vorm van regulering daarvan – net zo overtuigend zijn. Deze overwegingen hebben niet tot doel te ontkennen dat draagmoederschap belangrijke openbareorde-(en ethische) vragen opwerpt – wat vraagt om nauwkeurig onderzoek – noch tot doel – in de context van interlandelijk draagmoederschap – de bezwaren met betrekking tot commercialisering en uitbuiting te ontkennen. Het doel is echter om aan te geven dat een gemeenschappelijke basis te vinden is en een kader voor regulering mogelijk. Onderzoek op het gebied van adoptie en, meer specifiek, op het gebied van procreatie met behulp van voorplantingstechnologieën hebben immers laten zien dat er absoluut gemeenschappelijke elementen en gedeelde denkpatronen gevonden kunnen worden.

HOOFDSTUK 3 – EEN VERGELIJKEND PERSPECTIEF

Het hoofddoel van dit hoofdstuk is een verkenning van de nationale wettelijke regels die bepalend zijn voor het vaststellen van het juridisch ouderschap en de nationaliteit op het moment van de geboorte van het kind in elk van de onderzochte rechtsstelsels. Er wordt in het bijzonder aandacht besteed aan de wijze waarop deze regels worden toegepast op interlandelijke draagmoederschapconstructies.

In het eerste deel wordt een analyse gemaakt van de nationale regels (als deze bestaan) en de nationale benaderingen van draagmoederschap binnen de onderzochte rechtsstelsels. De nationale wetten en benaderingen met betrekking tot draagmoederschap en nationaliteit worden in elk van de rechtsstelsels in de volgende volgorde onderzocht: (i) rechtsstelsels die als anti-draagmoederschap worden beschouwd – Frankrijk, Zwitserland, Oostenrijk; (ii) rechtsstelsels waar draagmoederschap niet is gereguleerd – België en Nederland; (iii) rechtstelsels met een tolerante benadering van draagmoederschap – het Verenigd Koninkrijk; en (iv) rechtstelsels met een tolerante benadering van commercieel draagmoederschap – India en California. Naast de onderzoeksinterviews die gehouden zijn, zijn *explanatory reports*, jurisprudentie en commentaren van elk van de bovenstaande rechtssystemen geraadpleegd.

In het tweede deel van dit hoofdstuk verschuift de aandacht naar de conclusies die getrokken kunnen worden uit de rechtsvergelijkende analyse. Een inzicht in de verschillen en overeenkomsten tussen de nationale regels en benaderingen betreffende de vaststelling van juridisch ouderschap en de nationaliteit van een kind dat geboren is via draagmoederschap, wordt daarom gegeven. Een belangrijk doel is het vinden van een gemeenschappelijke basis. Dit tweede deel bestaat daarom uit een kritische analyse van de bevindingen uit het onderzoek in de verschillende nationale rechtssystemen. Hiermee kunnen de groeiende juridische problemen en de lacunes in de rechtsbescherming evenals de gebruikelijke reacties op interlandelijk draagmoederschap binnen de onderzochte rechtsstelsels geïdentificeerd worden. Duidelijk is dat het fenomeen interlandelijk draagmoederschap heeft geleid tot een bloeiende internationale markt.

HOOFDSTUK 4 – RECHTEN VAN HET KIND BIJ INTERLANDELIJK DRAAGMOEDERSCHAP

Na de wijze waarop de onderzochte rechtsstelsels omgaan met interlandelijk draagmoederschap bekeken te hebben, wordt het bestaande internationaal kader onderzocht waarbinnen deze rechtssystemen moeten functioneren. De bejegening van kinderen die geboren zijn na draagmoederschap, de draagmoeder zelf, de wensouders en celdonoren roept vragen op van duidelijk mensenrechtelijke aard. De bevindingen van hoofdstuk 3

illustreeren dat de praktijk van draagmoederschap een aantal fundamentele rechten-kwesties behelst, voornamelijk het belang van het kind, het recht van het kind op informatie over zijn of haar afkomst, de behoefte aan continuïteit van de persoonlijke staat om hinkende familierechtelijke verhoudingen te voorkomen en de vrijwillige en geïnformeerde toestemming van de draagmoeder.

Dit hoofdstuk probeert vast te stellen hoe de rechten van het kind en de volwassen partijen in een interlandelijke draagmoederschapsconstructie het beste begrepen en beschermd kunnen worden, door invulling te geven aan de relevante beginselen zoals uiteengezet in Europese en internationale verdragen. Dit omdat elke nationale benadering van interlandelijk draagmoederschap samenhangend met en gestoeld moet zijn op deze beginselen. Het doel is om een analyse van de meest relevante internationale verdragen te geven, zodat een uitgebreid overzicht van de huidige normen gegeven kan worden en vastgesteld kan worden of er een normatieve kloof bestaat in de bescherming van kinderen die geboren zijn via draagmoederschap.

De relevante internationale verdragen worden behandeld in de volgorde van hun regionale toepassing. Begonnen wordt met de verdragen van de Verenigde Naties, om vervolgens de verdragen van de Haagse Conferentie voor Internationaal Privaatrecht, de Raad van Europa en – uiteindelijk – de instrumenten van de Europese Unie te behandelen. Niet-bindende instrumenten, zoals het werk van de *Commission on European Family Law*, worden ook behandeld.

Wat de Europese context betreft, onderzoekt dit hoofdstuk of het recht op eerbiediging van privé-, familie- en gezinsleven, het belang van het kind en het proportionaliteitsbeginsel (dat onderdeel is van de beoordeling van de noodzakelijkheid) zoals vormgegeven door het Europees Hof voor de Rechten van de Mens wellicht een rol zouden kunnen spelen in het ontmantelen van regels die draagmoederschap verbieden. De gevolgen van EU-recht en de vrije verkeersrechten in de context van draagmoederschap worden ook behandeld.

Dit hoofdstuk concludeert dat geen van de behandelde regionale of internationale instrumenten draagmoederschap ronduit verbiedt. Daarnaast kan geen van deze instrumenten opgevat worden als een belemmering voor regelgeving die draagmoederschap toestaat. Tegelijkertijd wordt aanvaard dat de onvermijdelijkheid van interlandelijk commercieel draagmoederschap niet op zichzelf een rechtvaardiging kan zijn voor een tolerant regelgevingstelsel wanneer de praktijk rond draagmoederschap in strijd geacht wordt te zijn met internationaal recht. Een van de belangrijkste leidende beginselen is immers de geïnformeerde en voortdurende toestemming van de draagmoeder. Kinderen lijken dus een noodzakelijk recht te hebben op overdracht van die kinderen over grenzen, juridisch ouderschap en de identiteit van een kind.

HOOFDSTUK 5 – HET RECHT VAN EEN KIND OP EEN NATIONALITEIT EN HET VOORKOMEN VAN STAATLOOSHEID

Niet-erkenning van de relatie tussen ouder en kind kan een aantal ernstige consequenties hebben voor de rechten en het welzijn van het kind, in het bijzonder wat betreft het recht van het kind op een nationaliteit en de plicht van staten om te voorkomen dat een kind staatloos wordt. Daarom behandelt dit hoofdstuk draagmoederschap in de context van nationaliteit. De kernvragen zijn: moet het kind de nationaliteit van zijn of haar wensouder(s) verkrijgen? Moet het kind de nationaliteit krijgen van de staat waarin hij of zij geboren is? Hoe kan – als dat al mogelijk is – voorkomen worden dat een kind staatloos raakt en wat zijn de plichten en internationale normen waar staten aan gebonden zijn wanneer zij inschrijving overwegen, evenals de nationaliteit en status van een kind geboren via een draagmoederchapsconstructie. In de context van het recht van een kind op een nationaliteit en de plichten van staten die daarmee samenhangen, worden de volgende vragen beantwoord: hoe moet worden omgegaan met een kind dat geboren is via draagmoederschap en dat door een verandering in zijn personele staat (bijvoorbeeld door een latere vaststelling van het ouderschap ten gunste van de wensouders) zijn nationaliteit verliest? Mocht zo'n kind staatloos zijn geworden, dan is het nationale recht aantoonbaar indirect discriminerend; het discrimineert bijvoorbeeld kinderen die na draagmoederschap geboren zijn door geen wet- of regelgeving te hebben die zo'n kind beschermt tegen staatloosheid.

Wanneer er onduidelijkheden bestaan over het juridisch ouderschap van de draagmoeder en de wensouders of wanneer het onmogelijk is om dit vast te stellen op het moment van geboorte van het kind, dan betekent dit voor het kind dat aan zijn of haar recht op een nationaliteit doorgaans niet kan worden voldaan. Het doel is om vast te stellen of er onder international recht een aantoonbare schending is van het recht op een nationaliteit in zaken over nationaliteit van staatloze kinderen die na draagmoederschap geboren zijn.

Dit hoofdstuk onderzoekt de pogingen die op bilateraal, regionaal of internationaal niveau gedaan zijn om te komen tot ofwel grensoverschrijdende samenwerking op dit gebied, ofwel tot een universeel recht op een nationaliteit en het voorkomen van staatloosheid. Het geeft een overzicht van deze pogingen om de verantwoordelijkheid aan te tonen die staten dragen jegens kinderen die geboren zijn via draagmoederschap. Het hoofdstuk geeft wederom een aantal aanbevelingen.

HOOFDSTUK 6 – OPTIES EN DE WEG VOORWAARTS

Een bron van zorg vormen het feit dat wereldwijd draagmoederschap geheel ongereguleerd is en het waargenomen beleidsvacuüm, waarbinnen draagmoederschap zich op een lukrake

wijze heeft ontwikkeld (en zich nog steeds ontwikkelt). Verschillende mogelijke vormen van juridische regulering van draagmoederschapconstructies zullen daarom op zowel nationaal als internationaal niveau besproken worden.

Naast een samenvatting van de hoofdstukken 3, 4 en 5, zullen verschillende conclusies en aanbevelingen gedaan worden die betrekking hebben op kwesties die overwogen moeten worden wanneer een staat interlandelijke draagmoederschap wil reguleren.

Besproken worden de voor- en nadelen van een formeel, bindend instrument op internationaal niveau – zoals een verdrag – of van een informele niet-bindende aanbeveling of richtlijn met betrekking tot minimumnormen en/of gemeenschappelijke beginselen. Vanwege de hoeveelheid ingewikkelde kwesties en de noodzaak van een mondiale aanpak wordt een internationaal instrument noodzakelijk geacht dat specifiek de problemen die samenhangen met interlandelijk draagmoederschap aanpakt. Gezien de uiteenlopende benaderingen van de juridische problemen rondom draagmoederschap verkent dit proefschrift ook of en in welke mate gecoördineerde *soft law* methoden – richtlijnen met gemeenschappelijke beginselen en minimumnormen – om een aantal redenen als een uitvoerbare eerste stap richting een oplossing kunnen fungeren. Ten eerste, de ervaringen met aanbevelingen en richtlijnen in andere rechtsgebieden lijken te laten zien dat staten deze volgen en dat ze erkend worden door internationale gerechtshoven en mensenrechtenorganisaties. Ten tweede, hoewel een internationale aanpak op zijn plaats is, zal een internationale aanpak het beste ontwikkeld kunnen worden wanneer individuele staten eigen visies hebben ontwikkeld. Het inzicht in de behoeften van kinderen die geboren zijn via draagmoederschap en van elk van de partijen die betrokken is bij draagmoederschap, blijft groeien en evolueren. Het kan daarom nodig zijn om de aanbevelingen na een aantal jaren te herzien, maar dit zou echter zeer moeilijk zijn als men in plaats daarvan al voor een bindend verdrag heeft gekozen. Ten derde, een aanbeveling, met haar niet-bindende karakter, geeft staten enige mate van flexibiliteit in de toepassing. Deze flexibiliteit komt goed van pas bij de bijzondere omstandigheden van kinderen die geboren zijn na draagmoederschap en hun families. Een aanbeveling, op de vierde plaats, heeft het voordeel dat ze direct toegepast kan worden, zelfs in afwachting van de inwerkingtreding van een verdrag. Het laatste deel van hoofdstuk 6 geeft enkele, meer algemene overwegingen met betrekking tot het omgaan met de uitdagingen die relevant blijven in de context van interlandelijk draagmoederschap.